Judy F Mulvihill
100 Tanviere CT
Simpsonville, SC 29680

3-19-98

Office of the Secretary
CPSC
Washington, DC 20207-3000 1

Re: ANPRF - Bunk beds

To Whom It May Concern:

I am writing in regard to the advanced notice of rule making pertaining to bunk beds. I truly feel there should be a mandatory standard in the design and construction of bunk beds.

If one child dies due to unsafe bunk bed design and manufacture this questions whether voluntary standards in the industry are sufficient to protect our children. Due to the fact that there were more than 45 fatalities and over 100,000 injuries from 1990 to 1995, I feel that is overwhelming evidence that mandatory standards **must** be passed to ensure that this tragedy does not strike another American family.

Very Truly Yours,

Judy F Mulvihill

Susan Power
96 Gillin dr
Simpsonville S.C.
29680

March 19, 1998

Office of the Secretary
CPSC
Washington, DC 20207-3000 1

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Susan Power

Charles A Bell
8 First Ave
Medford NY 11763

Dear Witter Account Executive.
2/18/98

Office of the Secretary
CPSC
Washington, DC 20207-3000 1

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Charles A. Bell

E. Columbia
46 Howes St.
Fort Jeff. Sta. NY 11776

2/15/95

Office of the Secretary
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Washington, DC 20207-3000 1

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Hoc 4/4/98

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CONSUMER PRODUCT SAFETY COMMISSION
16 C.F.R. Chapter II
63 Fed. Reg. 3280

COMMENT ON ADVANCE NOTICE OF PROPOSED RULEMAKING MANDATING BUNK BED PERFORMANCE STANDARDS

Jenny Dale Sullivan,, University of Tennessee College of Law

I. INTRODUCTION

This comment responds to the proposed rulemaking by the Consumer Product Safety Commission (CPSC or "Commission") that would create mandatory standards for the manufacture of bunk beds. The positions expressed herein are (1) that mandatory standards are necessary to prevent consumer fatalities by entrapment and fall; (2) that regulation should include a public service campaign for proper use of bunk beds and awareness of potential dangers, as well as standards governing the length and number of guardrails, maximum width of bed openings, and instructional labeling; (3) that regulation should proceed under the Consumer Product Safety Act to the exclusion of the Federal Hazardous Substances Act, rather than under both; and (4) that this Commission should carefully consider the effects of agency regulation of bunk beds on the availability of state common law tort remedies.

II. MANDATORY STANDARDS ARE NECESSARY.

I agree with this Commission's finding that there has been a "continuing pattern of nonconformance to the voluntary standard,"[1] such that "'compliance . . . is not likely to result in the elimination or adequate reduction of . . . risk of injury.'"[2] This decision is well-supported by the simple fact that while a voluntary standard has existed since 1978, deaths as a direct result of noncomplying design and/or inadequate warning of dangers continue

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[1] *63* Fed. Reg. 3282 (1998).

[2] *Id.* at 3284.

at a rate which is not insignificant. Moreover, this "simple fact" remains accurate upon closer examination of the underlying1 evidence.

A. Cost Containment

Putting aside the compelling reasons to manufacture a safe product, a financial incentive for noncompliance will likely always exist in the absence of a mandatory standard. For most manufacturers, fewer safety restrictions equal a lower raw production cost. (And, in turn, lower production cost *usually* equals a less expensive product in the market.) Thus, as the ANPR notes, "[n]onconforming beds can undercut the cost of conforming beds."[3]

Such an argument only touches the surface, because the above is arguably true for all goods. However, bunk beds deserve the extra attention afforded by regulation. First, bunk beds are frequently purchased for use by children; and as children grow, they often become too large for the beds. Because of this limited use-expectancy, parents may be more inclined to purchase the less expensive product, unaware of the potential for injury. Second, bunk beds maximize space and are likely to be used by families of meager income which (1) may have less space, and (2) may be more inclined to purchase a less expensive product. Therefore, this Commission must use regulation to compel safety improvements from those manufacturers that have resisted being guided by humanitarian incentives.

B. Lack of Knowledge

I further agree with this Commission's finding that smaller-scale manufacturers may be unaware of the benefits of producing a safer bunk bed[4]—in fact, to retreat one step, they may even be unaware of the *dangers* of producing an *improperly* constructed bunk bed. Bunk beds are not prescription drugs: nearly any "weekend-carpenter" can assemble one using materials from a home improvement store. This is the manner by which small,

[3] *Id.* at 3283.

[4] *Id.*

local manufacturers of goods for sale are born.

Small-scale producers are less likely to participate (or even know about) furniture manufacturers' associations and they are less likely to consult an attorney regarding their operations. Thus, they are also less likely to learn about bunk bed deaths or about the existence of a voluntary standard. Finally, they are less likely to fully comprehend the consequences under state tort law of selling an unsafe bunk bed, all of which better explain why fear of liability alone does not engender 100% compliance with the voluntary standard (for those left unpersuaded by a simple desire to avoid consumer injury)?

C. *Inadequa te Protection*

As this Commission again keenly noted, even the most current voluntary standard does not adequately protect against the dangers of entrapment and falling! The mandatory standard, however, can easily prevent the perils that befell two of the three victims of accidents involving complying beds by requiring that guardrails extend the length of the bed with a maximum 3½" opening at each end.' Of course, one should wonder at this point why an improvement on the voluntary standard would not provide the same protection (if followed). It would. Yet the inadequacy of the voluntary standard provides but another impetus for the change to more comprehensive regulation of bunk bed safety.

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[5] A cursory internet search by this admittedly Web-challenged writer produced a "home based" bunk bed business, stating that its beds "meet or exceed the standards as described in the U.S. Consumer Product Safety Commission's Release #97-193" *and* containing an "Important Notice" on "General Bunk Bed Safety Guidelines." However, accompanying photographs featured bunk beds with large (certainly over 3%") structural openings, and one photograph displayed a small child (certainly younger than six) posed on the top bunk of a bed with no guardrail. *See Welcome to Bunk Bed Charlie's* (visited Mar. 20, 1998) <http://members.tripod.com/~bunkbedcharlie/webpages/safety.htm>. The safety guidelines did, however, promote guardrails and caution against entrapment/fall, horseplay, and permitting children under six on the top bunk. *Id.*

[6] *63* Fed. Reg. 3282, 3283, 3284.

[7] See *id.* at 3282. I am not aware of what consequential difficulty this would cause to consumers as they climb into and down from the top bunk. It may be true that this is not a feasible option, though it seems that risks of entrapment (by a guardrail with a small opening) and falling while asleep (by no guardrail or a guardrail with a very large opening) are greater than the risk of falling while ascending or descending.

Furniture manufacturers' associations and consumer advocacy groups have surely endeavored to ensure consumer safety, and they have been extremely successful in reducing bunk bed injuries. However, even as voluntary standards improve, the industry will continue to lack an enforcement mechanism. Moreover, the industry likely lacks the ability to seek out small-scale violators in order to assess penalties for noncompliance. In addition to having the power of enforcement, this Commission *lacks* the vested economic interest which furniture manufacturers cannot help but consider when debating the costs and benefits of bunk bed change. The CPSC is the best regulator of bunk bed safety.

III. *WHAT* MANDATORY STANDARDS ARE NECESSARY?

Because over ninety-five percent of entrapment fatalities between 1990 and 1997 occurred on bunk beds failing to comply with voluntary standards,' voluntary standards are a good place to start. The maximum width of *any* structural opening (not just upper bunk head- and foot-board) should be 3½" and the bed should be sold with two guardrails that extend the length of the bed.

Because children are frequently the users of bunk beds, manufacturers and retailers should provide written (and oral, to the extent possible) instructions for purchasers on safe bed use by children. A product safety manual should instruct owners to assemble the bed with both guardrails and to warn children against using the bed for horseplay, jumping out of the bed, and placing limbs through bed openings. Owners should also be instructed to prohibit children under six from using the top bunk. In addition, these warnings should be (1) permanently attached to the mattress with an instruction prohibiting removal, and (2) affixed with permanent adhesive to a part of the bed structure which can be viewed at the time of each assembly.

Finally, I encourage initiation of a public service campaign of the type mentioned in the ANPR[9] to educate those who underestimate the potential dangers inherent in bunk bed structure and who fail to realize the need to supervise children's use of the beds.

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[8] *Id.* at 3281-82.

[9] *Id.* at 3284.

IV. REGULATIONS SHOULD BE PROMULGATED UNDER THE CPSA.

It is "in the public interest" to proceed under the Consumer Product Safety Act (CPSA) to the exclusion of the Federal Hazardous Substances Act (FHSA), rather than under both statutes, in order to avoid confusing and duplicative regulation as well as to avoid foreclosure of consumer rernedy under the FHSA.

A. Confusing and Duplicative Regulation

As this Commission noted, potential difficulty in determining whether each bunk bed is intended for use by children could cause confusion in deciding which set of regulations to apply.[10] Many parents who purchase bunk beds for children will choose not a "child-size" bed, but instead one that is twin-sized, to extend its usefulness as children grow. Thus, those beds not designed exclusively for children will nevertheless require the same warnings as those intended for children. Two sets of virtually identical directives are unnecessary and likely to foster confusion.

B. Foreclosure of Remedies

1. Preemption Under the FHSA and CPSA

Regulation of children's bunk beds under the FHSA would foreclose several avenues of consumer remedy against noncomplying manufacturers. While the CPSA expressly *rejects* preemption of state common law tort claims through its two "savings clauses,""[11] the FHSA contains no such savings clause, as this Commission is well aware. This difference may soon prove to be somewhat significant, once the dust settles on the U.S. Supreme Court's decision in *Medtronic, Inc. v. Lohr.*[12]

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[10] *See id.* at 3283.

[11] 15 U.S.C. § 2072(c) (1994) ("The remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by common law . . . ."); *id.* § 2074(a) ("Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law. . . to any other person.").

[12] 116 S. Ct. 2240 (1996) (rejecting by plurality preemption of manufacturing defect, design defect, and failure-to-warn claims brought under the Medical Device Amendments of 1976).

Though the CPSA has recently been held by two courts to preempt certain state common law tort actions,[13] both decisions predate *Medtronic.* To borrow analysis from Professors Robert Leflar and Robert Adler regarding how the *Medfronic* decision affects preemption ,[14]

> First, the *[Medfronic]* Court reaffirmed its recognition of the presumption against preemption in areas, such as products liability, traditionally subject to state law. Second, the Court's decision focused on the fact that the federal agency did not *require* the product in question to incorporate any particular design. . . .
>
> Finally, the *Medtronic* Court affirmed the importance of administrative determinations in assessing the extent of preemption under most statutes?

Applying these lessons to the CPSA/FHSA arena, a renewed presumption against preemption of state products liability claims after *Medtronic* does not weigh more heavily for or against either statute. Likewise' regulations requiring a manufacturer to adopt a *highly specific* design or warning are more likely to "butt heads" with (and thereby preempt) state products liability claims under either the CPSA or FHSA.'"

Applying the third of Leflar and Adler's observations, however, may tip the scales in favor of the CPSA:[17]

> CPSC regulations implementing the preemption exemption provision indicate the agency's understanding that it is state legislation and administrative regulation' not civil damage judgments' that is the subject matter potentially preempted by CPSC standards. "State or local requirements" subject to preemption are defined as "any statute, standard, regulation' ordinance, or other requirement that applies to a product regulated by the Commission, that is issued by a State or local government' and that is intended to have the force of law when in effect."[18]

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[13] See Moe v. MTD Prods., 73 F.3d 179 (8th Cir. 1995) (preempting claims based upon theory of failure to warn when federal regulations prescribed mandatory warning label); Cortez v. MTD Prods., 927 F. Supp. 386 (N.D. Cal. 1996) (same).

[14] See Robert B. Leflar & Robert S. Adler, The *Preemption Pentad: Federal Preemption of Products Liability C/aims After* Medtronic, 64 TENNI. L. REV. 691, 739 (1997).

[15] *Id.* (citations omitted).

[16] This accounts for the two decisions in favor of preemption under the CPSA, *supra* note 13.

[17] In discussing motor vehicle regulation, Leflar and Adler note in support that "the National Highway Traffic Safety Administration has generally taken.a 'no-preemption' position for many years." *Id.*

[18] *Id.* at 742 n.252 (quoting 16 C.F.R. § 1061.2(f) (1996)).

Furthermore, this Commission "has explicitly endorsed this position, stating that 'the statutory preemption provisions were intended to address the legislative type of standard or regulation' and rejecting the contention that the term 'State or local requirement' includes state common or statutory law."[19]

While it is true that the FHSA contains the same preemption exemption provision and that the above endorsement applies also to the FHSA, courts have been reluctant to provide this Commission's position the same administrative deference when evaluating a claim under the FHSA.[20] One possible reason could be that the FHSA is primarily a labeling act, when viewed in light of its original conception; and the CPSA has a more comprehensive objective. Regulations concerning labeling are generally more conducive to preemption because of their more specific, particularized nature.[21] Though highly particularized regulations may be preempted with equal force under either statute, the FHSA primarily regulates in this fashion, causing it to be "presumptively" (in a nonlegal sense) or "generally" preemptive. Moreover, the CPSA's two savings clauses likely cause the converse effect, making the CPSA the better choice for bunk bed regulation.

2. Private Cause of Action Under the FHSA and CPSA

As this Commission is well aware, the CPSA creates an explicit private right of action by "[a]ny person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule" against "any person who knowingly (including willfully) violated any such rule or order."[22] The FHSA contains no such express right;

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[19] *Id.* (quoting CPSC Application for Exemption from Preemption, 56 Fed. Reg. 3414, 3415 (1991) (preamble to 16 C.F.R. § 1061)) (emphasis added by Leflar and Adler).

[20] The CPSA preemption cases constitute a recent phenomenon and have been deemed "exceptional," see *id.* at 743 n.257; while preemption has been widespread under the FHSA. See, e.g., Comeaux v. National Tea Co., 81 F.3d 42 (5th Cir. 1996); Moss v. Parks Corp., 985 F.2d 736 (4th Cir. 1993); Lee v. Boyle-Midway Household Prods., Inc., 792 F. Supp. 1001 (W.D. Pa. 1992); Busch v. Graphic Color Corp., 662 N.E.2d 397 (Ill. 1996); State ex *rel.* Jones Chems., Inc. v. Seier, 871 S.W.2d 611 (Mo. Ct. App. 1994); DeHaan v. Whink Prods. Co., 1994 WL 24322 (N.D. Ill. Jan. 26, 1994).

[21] See *supra* note 16 and accompanying text; cf. Cipollone v. Liggett Group, 505 U.S. 504 (1992) (preempting certain state common law tort claims under a federal cigarette labeling act). Leflar and Alder recognized that the FHSA decisions cited *supra* note 20 were the aftermath of *Cipollone*, "applying an unreasonably expansive interpretation" of that opinion. See Leflar & Adler, *supra* note 14, at 745-46.

[22] *15* U.S.C. § 2072(a) (1994).

furthermore, courts have consistently held that there is no implied private cause of action under the FHSA.[23] A decision to regulate children's bunk beds under the FHSA would unduly foreclose a federal cause of action for violations by manufacturers.

V. EFFECTS OF REGULATION ON STATE CLAIMS SHOULD BE CONSIDERED.

Should this Commission promulgate mandatory standards for bunk bed manufacture, an injured consumer whose state claims are not preempted by federal law will have passed only the first hurdle toward recovery. In this era of heated debate over tort reform, the consumer and tort plaintiff must face an increasingly demanding burden of proof. In deciding whether to issue mandatory standards, the CPSC should carefully consider future consequences in the face of legislative trends toward exculpating manufacturers that comply with these standards.

As noted, the CPSA assures consumers that "[c]ompliance with consumer product safety rules . . . shall not relieve any person from liability at common law or under State statutory law."[24] However, the *effect* given to manufacturers' compliance varies. For example, the *Restatement (Second)* of *Torts* § 288C advises: "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."[25] In contrast, the *Restatement (Third)* of *Torts* § 7(b) instructs,

> In connection with a product seller's or distributor's liability for defective design or inadequate instructions or warnings: . . . a product's compliance with an applicable product safety statute or regulation is properly considered in determining whether a product is defective with respect to the risks sought to be reduced by the statute or regulation, but does not necessarily preclude as a matter of law a finding of product defect.[26]

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[23] Reigel Textile Corp. v. Celanese Corp., 649 F.2d 894, 903, 906 (2d Cir. 1981) (analyzing FHSA under guidance provided by Cort v. Ash, 422 U.S. 66 (1975)); lsgett v. Wal-Mart Stores, Inc., 976 F. Supp. 422,429 (S.D. Miss. 1997); Palmer v. Liggett Group, Inc., 635 F. Supp. 392, 397 (D. Mass. 1984); Doane v. Metal Bluing Prods., Inc., 568 F. Supp. 744, 746 (N.D.N.Y. 1983); Sparks v. Metalcraft, Inc., 408 N.W.2d 347, 354 (Iowa 1987).

[24] 15 U.S.C. § 2074(a) (1994).

[25] **RESTATEMENT (SECOND) OF TORTS: PRODUCTS LIABILITY** § 288C (1965).

[26] **RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY** § 7(b) (Tentative Draft No. 2, 1995).

The drafters' comments to the *Restatement (Third)* reassure that it reflects the "traditional view": most product safety statutes and regulations provide the minimum "floor of safety below which product sellers fall only at their own peril, but leave open the question of whether a higher standard . . . should be applied."[27] However, the comments go on to say that compliance may indicate a product's nondefectiveness as a matter of law, especially when the safety standard has been recently promulgated.[28] In such circumstances, a plaintiffs only remaining option is to prove that the deliberative process of the promulgating agency was tainted by false evidence or by the withholding of necessary information-a nearly insurmountable burden.[29]

The *Restatement (Third)* analysis seems plaintiff-friendly, however, when compared to Illinois law, for example. The Illinois legislature recently established a presumption that products complying with federal or state regulations are reasonably safe (provided the aspect causing harm was regulated).[30] Similar proposals have been brewing for over a decade, and their effect upon tort plaintiffs should not be underestimated.[31]

First, theories of strict liability would be eradicated by requiring proof of some degree of fault beyond the strictures of agency regulations. Second, this Commission would shoulder the immense burden of keeping standards ever-current' as is necessary when a standard becomes "safety absolute" rather than the "floor of safety." Third, reducing the deterrence mechanism inherent to tort judgments would significantly and detrimentally reduce voluntary safety innovations by manufacturers.[32]

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[27] *Id.* cmt. e.

[28] *Id.*

[29] *See id.*

[30] See 735 ILL. COMP. STAT. ANN. 5/2-2103 (1995).

[31] See, e.g., Teresa Moran Schwartz, The *Role of* Federal Safety *Regulations in Products Liability Actions, 41* VAND. L. REV. 1121, 1125-l 135 (1988) (summarizing proposals and outlining impacts upon products liability law).

[32] See *id. But* cf., Ashley W. Warren, *Compliance with Governmental* Regulatory *Standards: Is It Enough to Immunize a Defendant from Tort Liability?*, *49* BAYLOR L. REV. 763, 806-16 (1997) (presenting arguments against rejecting common law liability but arguing for a rebuttable presumption of no negligence); Frederick C. Schafrick, *Product Liability Suits for* Failure *to Warn of the Hazards of Regulated Products, 32* TORT & INS. L.J. 833, 835-36, 863 (1997) (arguing for "greater deference" in failure-to-warn cases).

VI. CONCLUSION

Though I agree that mandatory standards for bunk beds are necessary and I encourage this Commission to promulgate them under the CPSA; regulation should be carefully considered, with a goal of minimizing the impact upon the ability of those consumers who become injured to recover in tort.

ANPR FOR BUNK BEDS, 63 Fed. Reg. 3200
Docket No. 98-1457

Before the Consumer Product Safety Commission
Comments of **Heather White** Regarding the
Requirement of a Mandatory Standard for Bunk Bed Safety

"Indeed, if we are not eternally vigilant, the CPSC will next set its eyesight on the risk of waking up in the morning."

-- Bruce Fein, *Bunk Bed Safety Bunko,* WASHINGTON TIMES, at Al3 (Jan. 20, 1998)

1.0 INTRODUCTION

The Consumer Product Safety Commission (CPSC) has requested comments on its proposal to require a mandatory standard to avoid entrapment of children in bunk beds in its Advanced Notice of Proposed Ruling Making (ANPR).[1] I am a law student from the Southeastern United States. When I was a child, I yearned for a bunk bed. I watched friends somersault off the top bunk to stick a "perfect ten" landing on the floor. With a giant leap from the top bunk, other friends would slam dunk nerf basketballs through hoops attached to the door frame. In addition to its jungle gym qualities, the bunk bed stirred youthful imaginations. Sometimes the bunk bed became a spaceship, other times it became an house. It was childhood furniture at its best. In college, I finally had a bunk bed. It provided a safe, economical, and efficient furniture option for the limited space of my room. Thus, I write to protect the bunk bed from entrapment. If the new mandatory standard is adopted, the bunk bed might suffocate from bureaucratic red tape.

Specifically, I am concerned with the Commission's refusal to meet its mandate to "rely upon a voluntary consumer product safety standards rather than promulgate a consumer product safety standard." [2] The current ninety percent rate of compliance with the voluntary standard for bunk beds is effective, yet CPSC's General Counsel, Jeffery Brome, "sees no legal impediment to promulgation of a mandatory standard for bunk beds."[3] Secondly, the death of children from bunk bed fatalities is tragic, but the risk. of death from bunk bed entrapment does not merit a mandatory standard. Finally, parental responsibility, not a mandatory standard, will eliminate the risk of bunk bed fatalities and save children's lives. Mr. Fein is right. If the mandatory standard for bunk bed safety is adoptedi, the CPSC might as well address the risk of waking up in the morning.

2.0 THE CPSC SHOULD MEET ITS STATUTORY MANDATE TO DEFER TO VOLUNTARY STANDARDS, BECAUSE THE NINETY PERCENT COMPLIANCE RATE WITH THE CURRENT VOLUNTARY STANDARD ADEQUATELY ADDRESSES THE RISK OF INJURY ASSOCIATED WITH BUNK BED ENTRAPMENTS.

The CPSC does not need to promulgate a mandatory bunk bed standard, because the ninety percent compliance rate with the current voluntary standard adequately addresses the risks of injury.[4] The CPSC must defer to voluntary standards "whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is

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[1] ANPR for Bunk Beds, 63 Fed. Reg. 3200 (Jan. 15, 1998
[2] 15 U.S.C. § 2056 (1997)
[3] *CPSC Votes 2-l for Bunk Bed Rule: Moore's Vote to Gather Data Decides Issue,* BNA PRODUCT LIABILITY DAILY (Jan. 13, 1998).
[4] *Id.* "The existing standard for bunk beds, ASTM f1427, is effective in addressing the entrapment hazard, and approximately 90 percent of the 106 known bunk bed manufacturers currently comply with it." *Id.*

likely that there will be substantial compliance with such voluntary standards." [5] As addressed in section 3.0, the ninety percent compliance has limited the risk of bunk beds to a reasonable level. Since the term "substantial compliance" is not defined in the statute, the CPSC General Counsel has reduced its analysis to a single question: "If the rule were mandatory as compared to voluntary, would it make a difference?"[6] A mandatory rule would not make a difference because 1) substantial compliance with the voluntary standard exists; 2) unknown regional manufacturers do not threaten the effectiveness of the voluntary standard; and 3) CPSC may recall products which do not comply with the voluntary standard.

The mandatory rule would not make a difference because "substantial compliance" with the voluntary standard exists. In its ANPR for this rule, CPSC states "all 106 manufacturers identified by CPSC staff appear to be producing beds that conform to the entrapment requirements in the ASTMF 147 bunk bed standard."[7] Commissioner Sheila Gall, who voted against the ANPR, commented that the CPSC staff cannot identify "even one manufacturer, distributor, or retailer known to be out of compliance with the voluntary standards."[8] If the CPSC cannot identify one non-complying manufacturer, distributor, or retailer, and CPSC admits that the compliance rate is at least ninety percent, then surely "substantial compliance" exists.

Even though the CPSC cannot name a non-complying company, it cites a need for a mandatory standard because unknown regional manufacturers might construct non-conforming beds.' CPSC fears that small regional manufacturers and other "mom and pop" bunk bed manufacturers are "unaware of the voluntary standard" or might "misinterpret the voluntary

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[5] 15 U.S.C. § 2056 (1996).
[6] BNA PRODUCT DAILY (Jan. 15., 1998).
[7] ANPR for Bunk Beds, 63 Fed. Reg. 3280'3283 (Jan. 22, 1998).
[8] *CPSC Votes 2-1, supra* note 3, at 2.

standard." [10] If this fear provides the impetus for a mandatory rule, then the CPSC should invest its resources to educate small businesses about CPSC standards, rather than punish them. The CPSC admits that small regional manufactures "are not likely to account for a significant share of the U.S. market."" Therefore, it is unlikely that non-compliance from a regional manufacturer would affect the total rate of substantial compliance from manufacturers. Even if the CPSC calculates substantial compliance from the number of products produced, it has no idea how many bunk beds are manufactured by regional businesses. The only thing the CPSC does know about these unknown small businesses is that they do not constitute a large share of the market. It follows, then, that small regional businesses do not produce a large number of bunk beds. Thus, a mandatory standard would not make a difference because all known manufacturers of bunk beds have complied with the voluntary standard.

Furthermore, the mandatory standard would not make a significant difference in enforcement, because the CPSC maintains the authority to recall non-complying bunk beds under the voluntary standard. The Commission supports a mandatory standard because it would allow the Commission to seek penalties for violations of a voluntary standard.'* The Commission could also publicize fines to deter other manufacturers from noncompliance.[13] Yet, the CPSC has recalled more than 500,000 bunk beds for nonconformance with voluntary standard since 1994. [14] The CPSC publicized these recalls? Under the voluntary standard, CPSC still has the enforcement power to protect the public for non-conforming bunk beds. If a regional

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[9] 60 Fed. Reg. 3280, 3282 (Jan. 28, 1.998).
[10] *Id.*
[11] *Id.*
[12] *Id.* at 3283.
[13] *Id.*
[14] *Id.*

manufacturer fails to comply, the CPSC may recall the bunk beds. Given the CPSC's current ability to recall non-complying beds and its power to publicize under the voluntary standard, a mandatory rule would not change the compliance rate or reduce the risk of death to children.

CPSC should comply with its mandate to defer to the current voluntary bunk bed safety statute, because a mandatory standard would not change the current ninety percent compliance rate, nor would it reduce the already slight risk of death to children from bunk beds.

3.0 CPSC SHOULD RETAIN THE VOLUNTARY STANDARD BECAUSE THE RISK OF DEATH TO CHILDREN, WHILE TRAGIC, IS NOT SUBTANTIAL ENOUGH TO MERIT A MANDATORY STANDARD.

The risk of bunk bed entrapment fatalities does not merit a mandatory rule, because the voluntary standard has reduced the potential risk to children to a reasonable level. A child has a greater chance of drowning in a bucket than dying from entrapment in a bunk bed.[16] During 1984 through 1989, the CPSC determined that 160 bucket-related drownings occurred.[17] The average number of young children who drowned in bucket-related injuries, twenty-seven per year, is almost three times as great as the average of bunk bed entrapment fatalities, ten per year.[18]

The daily risk of bunk bed entrapment also reflects the improbability of injury. [19] Bruce Fein calculated the daily bunk bed fatality risk to children by using the CPSC estimate of 7

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[15] *Id.*
[16] *N.* Clay Mann et al., *Bucket-Related Drownings in the United States, 1984 Through 1990 , 89* PEDIATRICS 1068-1071(1992).
[17] *Id.*
[18] *Id. 63* Fed. Reg. 3280, 3283 (Jan. 28, 1998).
[19] Bruce Fein, *Bunk Bed Safety Bunko,* THE WASHINGTON TIMES, at Al3 (Jan. 20, 1998).

million to 9 million bunk beds in current use.[20] This statistic translates into three billion days of child bunk bed "hazard,' annually and twenty-four billion days during the eight years.[21] Entrapment caused fifty-four deaths over the eight year span.[22] Thus, in twenty-four billion bunk-bed-days the entrapment hazard was implicated in fifty-four deaths, or one in every 444 million daily risks.*" One death out of 444 million daily risks of bunk bed use does not constitute an unreasonable hazard. The .0000025 percent daily chance of a child fatality from bunk bed entrapment constitutes a reasonable risk.

Furthermore, the risk of entrapment is not unique to bunk beds. In 1985- 1988, 105 infants died from entrapment on adult conventional mattresses. This statistic excludes waterbeds, cribs, and mattresses.[24] For the three year period of the study, adult conventional mattresses resulted in greater than twice the number of bunk bed entrapment fatalities. In addition to other entrapment hazards, it is unclear if a mandatory standard would reduce entrapment. Some studies indicate that bedding and linens, not the bunk bed itself, may cause entrapment.[25] Linens, comforters, and blankets may cause children to become trapped between the bed and the wall when they sleep on regular beds or bunk beds. [26] Thus, the CPSC should retain the voluntary standard, because it adequately addresses the minimal risk of bunk bed entrapment.

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Waterbed Industry Group urges voluntary warning labels regarding infants for all adult bed and beddingproducts,* BUSINESS WIRE, July 20, 1989.
[25] *Id.*
[26] *Id.*

4.0 ONLY PARENTAL RESPONSIBILITY, NOT A MANDATORY STANDARD, WILL ELIMINATE THE RISK OF BUNK BED FATALTIES.

Despite the limited risk and the current compliance rate of at least ninety percent, the rhetoric of the CPSC "Chicken Little?' continues. Chairman Ann Brown has lamented that each non-conforming bunk bed has "the potential to kill a child."[27] Yet, irresponsible parents, not products, pose the greatest risk to children. Parents should not allow young children to sleep or play on the top bunk. The CPSC can only regulate products, not parents.

The limited ability of young children to perceive or avoid hazards causes most injury related deaths.[28] Since children cannot determine the hazards of products, parents must act to protect their children. Parental factors are significant keys to the success of injury prevention. A recent study in Tennessee identified three maternal characteristics that were strongly and independently associated with increased risk of mortality from injury during early childhood: low education, young age, and increased number of children. [29] For children from one to four years of age, young children whose mothers had less than twelve years of education, were less than twenty years of age, and had more than two other children had a rate of injury mortality fifteen times higher than for children whose mothers were college graduates, greater than thirty years of age, and who had less than children. [30] The CPSC cannot change these factors through the adoption of a mandatory bunk bed safety standard.

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[27] Don Oldenburg, *Learning from Tragedy,* THE WASHINGTON POST, Mar. 3, 1998 (quoting CPSC Chairman Ann Brown).
[28] Harvey F. Davis, Jr., et al., *The 1990 Objectives for the Nation for Injury Prevention: A Progress Review* , 99 PUBLIC HEALTH REP. 10, 12 (1984).
[29] Seth J. Scholer et al., *Predictors of Injury Mortality in Early Childhood,* 100 PEDIATRICS *342-347 (I 997).*
[30] *Id.*

Ultimately, parents must take responsibility for the elimination of the slight risk of bunk bed injuries. Yet, parents seem to support increased industry regulations to dodge responsibility for accidents which happen to their children. Some injury prevention studies show that education of parents about consumer product-related hazards and the use of warning labels have not been effective in preventing pediatric injuries related to other consumer products.[31] Other studies have determined that "prevention strategies requiring increased human effort or action are least likely to succeed in preventing injuries."[32] It is time for parents to increase their human effort in parenting and act to prevent injuries. Parents should inform their children of the hazards of bunk beds and should not place infants on the top bunk. Thus, parental responsibility, not a mandatory standard, will eliminate the already minimal risk of injury from bunk beds.

5.0 CONCLUSION

The CPSC should retain the voluntary standard for bunk bed safety. The current ninety percent compliance rate constitutes "substantial compliance." The voluntary standard adequately addresses the risk of fatalities from bunk bed entrapment. Finally, eradication of the risk depends upon parental responsibility, not more CPSC regulations. Therefore, I ask the CPSC to retain the voluntary standard to prevent the bunk bed from drowning in a bucket of red tape.

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[31] Gary A. Smith, *Injuries to Children in the United States Related to Trampolines, 1990-1995.* 101 PEDIATRICS 406-412 (1998) (citing several injury prevention studies)

[32] *Id.*

PROPOSED RULES
CONSUMER PRODUCT SAFETY COMMISSION
16 C.F.R. Chapter II
63 Fed. Reg. 3280

COMMENTS OF JAY L. JOHNSON, CONCERNING THE ANPR FOR BUNK BEDS

INTRODUCTION

My name is Jay L. Johnson, and I am a 23 year old second year law student at The University of Tennessee College of Law in Knoxville, Tennessee. As part of the requirements for the course in Administrative Law I am taking this semester, I am required to write a comment to a proposed regulation. Since the professor selected this ANPR on bunk bed safety regulations as the one on which the entire class must comment, I now give the Commission my own insight on this matter.

I am writing to comment on the Advance Notice of Proposed Rulemaking concerning mandatory safety standards for bunk beds. 63 Fed. Reg. 3280 (Jan. 22, 1998). In addition to writing as a law student, I write as a consumer, a citizen, and a child who once slept in bunk beds.

I believe that it is vitally important for products available to consumers be manufactured so that the consumer of the goods need not worry about the product's safety. It is particularly important

that products used primarily by children be as safe as is possible.

I also realize that in most instances, businesses are in business to make money by providing a valuable good or service.

The goals of the consumer and the producers are often at odds with one another. This is where I believe the proper role of governments come into play. I believe that government's regulatory role in this picture is limited. The government must find the middle ground between protection of citizen safety and securing the strength of business.

I believe that by applying this general theory of regulation to the proposal for bunk bed safety regulations, all parties involved can gain, with minimal negative impact on anyone.

I have concerns about the effectiveness of implementing a mandatory safety standard instead of relying on industry voluntary standards. Because I believe in balancing competing views, after I read the ANPR published concerning bunk bed regulations, I decided to research the industry position further. I contacted the American Furniture Manufacturers Association (AFMA) and spoke with Mr. Joe Ziolkoswsi, the Director of Technical Services, who was able to provide me with some insight into the industry's position on the ANPR.

After reading the information from both the Commission's and the AFMA's viewpoints. I have developed a compromise position that I believe does not compromise the security of consumers or the security of the manufacturer. In my view, the CPSC and the bunk bed manufacturers can work together, as in the past, to develop a policy that works in everyone's benefit, without excessive government entanglement in the private business sector, while improving consumer safety.

COMMENTS ON THE CPSC MANDATORY STANDARD

I believe that the CPSC's recommendation for a mandatory safety standard for bunk beds is, in principle, a wise, consumer oriented measure. However, I also believe that there are faults in justification for the regulation that should be addressed before implementing a new level of governmental regulation.

The first difficulty I notice in the CPSC's position is in Section D of the ANPR. In this section labeled "Compliance With the Existing Voluntary Standard," the CPSC notes that "There has been a continuing pattern of nonconformance to the voluntary standard." Id. at 3282. The ANPR goes on to say that 17 companies were identified that marketed bunk beds that did not conform to the voluntary standard. This number, however, is diminished in strength by the further statement that the CPSC identified at least

106 different companies importing or manufacturing bunk beds for sale in the United States. Id at 3282.

In the next section of the ANPR, "The Potential Need for a Mandatory Standard," the CPSC engages in what appears to be speculation without support. The CPSC states that ALL 106 identified manufacturers of bunk beds produce beds within the voluntary safety standard. Despite all of this, the ANPR goes on to say that the possibility that new, small manufacturers might not know the standard justifies a federally mandated standard. Id at 3283. Simply based on the points made in this section of the ANPR, I believe that this hypothetical situation, considered by itself, does not justify a mandatory safety standard.

COMMENTS ON THE AFMA'S VOLUNTARY STANDARD

Voluntary standards are, by their very nature, difficult to enforce. The AFMA and other industry groups have established a standard that has no real teeth. While the standard is well based and provides the best possible safety measures to secure the lives and health of consumers, there is no one who can force a manufacturer of bunk beds to comply.

The majority of the industry has shown a willingness to comply with the voluntary standard, but as the CPSC has noted, some

manufacturers may opt not to comply, thus leaving the consumer unprotected against a potentially dangerous product.

Because of the potential for noncompliance with the voluntary standard, I do believe that something should be done; however, I still maintain that a mandatory standard is not the proper solution.

MY COMPROMISE SOLUTION

I believe that I have devised a simple, effective compromise to the standoff between the CPSC and the bunk bed manufacturers. I propose a solution that requires the efforts of both the CPSC and the manufacturers to be successful.

For this policy to work, the CPSC must reject the mandatory standard proposed in the ANPR. Instead, the CPSC must take action to increase public awareness of the industry's voluntary standard, thus encouraging industry compliance.

RAISE PUBLIC AWARENESS

There are at least two things that the CPSC should do to effect this awareness raising. First, the CPSC should utilize its position as a governmental agency to broadcast a series of Public Service Announcements (PSA's)to inform the public that there is a voluntary industry standard for bunk bed safety. In conjunction

with these PSA's, the CPSC should authorize a "Seal of Approval" to be placed on bunk beds that comply with the voluntary standard.

The CPSC should require applications from all manufacturers who wish to have the seal on their bunk beds. The CPSC should inspect all bunk bed manufacturers who apply to have the new CPSC "Seal of Approval," to ensure compliance with the voluntary standard.

The CPSC, without making an overreaching step into the industry's self-regulation, can still take these positive steps to spur the market for bunk beds with the "Seal of Approval."

The CPSC should also consider the use of PSA's to inform consumers and existing owners of bunk beds how to use them safely. This public service would also help prevent the serious injury and loss of life that result from improper use of existing bunk beds.

In addition to a PSA campaign, the CPSC should promulgate a pamphlet that must be given with each bunk bed sold. The contents of the pamphlet should include information concerning the safety features of the bunk bed, as well as information of the proper, safe use of the bunk beds.

This pamphlet is the only mandatory action I suggest that the CPSC take concerning further bunk bed regulation. I suggest that the pamphlet be attached to all bunk beds sold in the United

States. I also suggest that the pamphlet increase the likelihood of consumer use by using pictures and charts showing the proper use of the bunk beds. Dense, highly technical language should be avoided in the promulgation of this informational pamphlet.

MANUFACTURER OBLIGATIONS

The bunk bed manufacturers must also act to insure the safety of the consumer in this compromise. The manufacturers must take steps within the industry to study and improve the voluntary standard when it is necessary.

Because the industry must innovate and continually improve its product to compete in the market, the manufacturers are in a better position to determine whether the voluntary standard meets the evolving safety requirements of consumers. By leaving the responsibility for the actual scope of the standard with the industry, the CPSC is acting in the best interest of the consumer. The industry can act quickly, without the formalities and delays of agency rulemaking, thus enabling faster, more responsive benefits to the consumer.

It always makes sense to allow the people with the best knowledge and most experience to handle the implementation and modification of a policy decision. The regulation of bunk beds is no exception to this rule.

SUMMARY

In summary, the benefits of the policy I have proposed essentially accomplishes more consumer benefit at a lower cost to manufacturers, and removes the necessity for another level of government involvement in the regulation of business.

First, the compromise policy I have proposed creates a better informed consumer. By a wide-spread PSA campaign, the CPSC can tell the bunk bed consumers in the United States that bunk beds can be dangerous, but, if used properly, those same bunk beds can be completely safe. The well-informed American citizen is a powerful force in the nation's economy, and this force will move action within the manufacturers of bunk beds.

Second, this movement within the industry will improve the likelihood of safety innovation. By telling the public that CPSC safety approved bunk beds have the "Seal of Approval," the manufacturers will be compelled to comply with the voluntary standard to earn the seal in order to maximize their sales. I believe that the CPSC should make the policy an incentive, not a mandate. By doing this, everyone involved wins.

CONCLUSION

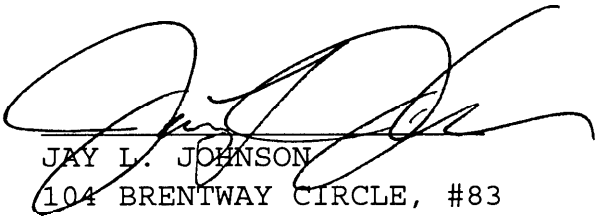
I believe that the theory of positive reinforcement works better to spur private sector action than a punitive, deterrent

policy. Even if the same goals are reached (which I believe they will be), the manufacturers of bunk beds will feel as though they are not being dominated by a government that wants to control all of its business decisions. Instead, the CPSC can accomplish all of the consumer safety measures that it seeks by a policy of encouragement of industry through public information.

In reality, the policy I propose will accomplish more good than a simple regulation of bunk bed safety standards. If the CPSC simply adopts a mandatory standard of safety in bunk beds, the public will still remain largely unaware of the proper, safe use of bunk beds. By publicizing the proper use, the CPSC will save more lives and serious injuries than it would be merely mandating a standard.

Everyone concerned in this matter benefits from the policy I have recommended. I believe that my suggestions should be considered strongly before the proposed mandatory safety standard is approved.

RESPECTFULLY SUBMITTED,



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Chris Anderson

CONSUMER PRODUCT SAFETY COMMISSION
DOCKET No. 3280-01; 16 CFR CHAPTER II

COMMENT OF INTERESTED PERSON REGARDING IMPLEMENTATION OF MANDATORY CONSTRUCTION SAFETY STANDARD FOR BUNK BED MANUFACTURERS

This Comment is in response to the Consumer Product Safety Commission's request for comments concerning the implementation of a mandatory safety standard on bunk bed manufacturers for the construction of bunk beds. The current standard, developed by the American Society for Testing and Materials (ASTM), is voluntary and relies on the furniture industry to enforce its provisions. I support the implementation of a mandatory safety standard with a few concessions including additional performance standards that are necessary to augment those currently imposed by the industry. The CPSC should impose and enforce a mandatory safety standard for the construction of children's bunk beds because the industry seems either unable or unwilling to alleviate the alarming rate of noncompliance among manufacturers. Additionally, the CPSC should implement additional safety standards and take further steps to ensure the new standard's effectiveness. I respectfully submit this Comment for your perusal in the hope that you will consider these concerns prior to drafting a final rule.

Why the CPSC Should Impose a Mandatory Safety Standard on Manufacturers

The CPSC should impose a mandatory standard for three reasons. First, the risk to children of serious injury or death as a result of improperly constructed bunk beds is

too severe and too prevalent to yield to the furniture industry's discretionary enforcement. According to a CPSC study, eighty-five children under the age of fifteen died from bunk bed related injuries between January 1990 and September 1997.[1] Sixty-four percent of those deaths were the result of entrapment while an additional twenty-three died by hanging themselves from structural members of the bed.[2] Of the children dying from entrapment, over ninety-six percent were three years of age or under.[3] Moreover, ninety-six percent of these deaths occurred in beds that did not conform to the voluntary ASTM safety standard."

These statistics indicate that a child using a bunk bed that does not conform to the ASTM standard has a much higher chance of serious injury or death than a child using a bunk bed that conforms. Since an instrument with the potential to inflict great bodily harm to children is being injected into the market place, the federal government has a substantial interest in protecting the welfare of unknowing children. The risk presented by beds that do not conform to the current ASTM standard is both too severe and too prevalent to grant manufacturers the discretion to decide whether to comply with a voluntary standard. Consequently, the federal government must ensure that bunk beds are being designed in a manner that poses the least risk to children.

The second reason the CPSC should impose a mandatory safety standard on the bunk bed industry involves reducing the harm inflicted by manufacturers who fail to

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[1] Memorandum from Consumer Product Safety Commission, Nov. 18, 1997 at 1. This Memorandum is part of the CPSC staffs briefing package on possible regulatory options to address the hazard of children's entrapment in bunk beds.

[2] Id.

[3] Id. at 2.

[4] Memorandum from Consumer Product Safety Commission, Nov. 26, 1997 at 5.

comply with the voluntary standard. As stated above, all but three deaths occurred in a non-conforming bunk bed. However, statistics indicate the production of non-conforming bunk beds has not fallen with the advent of the ASTM voluntary standard. In August 1994, nearly two years after the ASTM developed its newest safety standard, seventeen of eighty-five bunk bed manufacturers were marketing designs that "presented potential entrapment hazards."[5] In addition, forty-one manufacturers since November 1994 have recalled 500,000 bunk beds that did not conform to ASTM entrapment standards! Just last February, the Office of Compliance identified twelve bed designs from a pool of seventy-seven that failed to conform to the voluntary ASTM entrapment standards.'

Current ASTM safety standards were issued in October 1992 yet the incidence of non-conformance among manufacturers has not diminished. The furniture industry seems unable to enforce the ASTM standard in a manner that decreases the production of non-conforming bunk beds. The federal government, however, has methods not available to the industry. With the enactment of a mandatory standard, the CPSC can impose fines, secure court-ordered injunctions to halt production of non-conforming beds and various other enforcement actions to coerce non-conforming manufacturers. Clearly, a mandatory safety standard will give the CPSC the necessary authority to decrease non-conformance to the ASTM standard -- something the industry has been unable to accomplish.

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[5] Memorandum from Consumer Product Safety Commission, Nov. 26, 1997 at 5.

[6] Id.

[7] Id.

The third reason for implernenting a mandatory safety standard involves creating a level playing field in the marketplace to ensure that manufacturers who currently voluntarily comply with the safety standard are not undercut by manufacturers who lower costs by refusing to comply with the safety standard. Currently, all 106 manufacturers identified by the CPSC voluntarily comply with the ASTM standard.[8] However, there are numerous regional and local manufacturers not identified by the CPSC who may be unaware of the prevailing standard. A mandatory standard would decrease the retail demand of these beds because retailers would be unwilling to violate the law to sell bunk beds that do not conform to federal regulations. Consequently, manufacturers complying with the standard are not penalized for manufacturing bunk beds that conform to the safety standard.

Additional Steps the CPSC Should Take

In addition to implementing a mandatory safety standard, the CPSC should take additional steps to increase the public's awareness of the inherent risks of bunk beds. The CPSC should mandate specific labeling and instructional requirements and launch a focused educational campaign to inform consumers and small local and regional manufacturers of the mandatory standard.

Educating the public regarding the inherent risks presented by bunk beds reaps two benefits. First, public awareness that bunk beds are dangerous increases the retail demand for beds that conform to safety standards and decreases the demand for beds that

[8] Id. This statement might be seen as contradicting the argument above that non-compliance among manufacturers has not decreased. All manufacturers' designs conformed to the safety standard when the CPSC conducted its last compliance study. However, as is argued above such an assessment is not an

fail to conform to safety standards. Second, as parents become more familiar with the risks associated with bunk beds, they are more likely to carefully monitor bunk bed use and prevent injury.

There are several ways the CPSC can educate the public regarding the risks associated with bunk beds. First, the CPSC must enlist help from the furniture industry. The American Furniture Manufacturers Association (AFMA) represents the largest portion of bunk bed manufacturers that voluntarily comply with ASTM standards. Consequently, the AFMA has a financial incentive to ensure there is a mandatory safety standard. A mandatory standard could eradicate competition by forcing small local and regional manufacturers to alter their present production process. Such a drastic change could cause a substantial cut in their profit margins and run them out of business. Industry collectives such as the AFMA should contribute to a fund for educating the public and other manufacturers who are unaware of the mandatory standards. Each manufacturer's contribution should be based on total sales, which ensures that the manufacturer with the most to gain contributes the most to the fund.

Besides educating the public and manufacturers, the CPSC should concentrate on effectively enforcing the new mandatory standards. Since small local and regional manufacturers pose the greatest threat of non-compliance while simultaneously presenting the most difficult challenge for enforcing the provisions, the CPSC should request the help of state attorneys general and consumer watchdog groups.

The CPSC should coerce the consumer protection divisions of each state attorney general and consumer groups to lobby their respective state legislatures to pass the

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accurate indication of future actions. Manufacturers seem willing, either intentionally or inadvertently, to skirt safety standards on bunk bed designs. Regardless, the incidence of non-compliance has not fallen.

mandatory standard as state law. Naturally, a state statute gives state law enforcement officers the authority to enforce the mandatory standards on a state level. Such an effort should work to alleviate the risks to children presented by local and regional manufacturers who produce bunk beds that do not comply with the mandatory standard. The lobbying effort would also have the secondary effect of bringing bunk bed safety to the forefront of public debate and could serve to further educate the public and potential non-complying manufacturers.

Additional Provisions That Should Be Included in the Mandatory Standard

It is clear that implementing a mandatory standard is the first step in preventing the risks associated with entrapment. However, the potential for serious injury can be further prevented if additional safety provisions are included in the mandatory safety standard.

Section 4.5.5 of the entrapment requirements of the ASTM standard states that a manufacturer does not have to construct a guardrail that runs the entire length of the bed.[9] Instead, the standards allow the manufacture to terminate the guardrail fifteen inches from the end structure at each end on both sides. Such an allowance provides an opening large enough for a small child to wedge herself and suffocate between the guardrail, the mattress, the end structure and/or the wall. As a result, the provisions should be changed to require guardrails that run the entire length of the bed on both sides. I am aware that the CPSC is considering requiring manufacturers to place a bed-length guardrail for the

[9] American Society of Testing and Materials Consumer Safety Specification for Bunk Beds, ASTM F1427-96.

wall-side of the bed.[10] However, such a provision does not consider how easily and often children's furniture is moved and rearranged within the home. Turning the bed around can easily change what was originally designated as the wall-side to the bed's outside. Such a scenario is not farfetched when one considers the habits of expanding families who must move furniture from room to room to accommodate the needs new family members.

Perhaps a better option is to require that the manufacture to include at least one **interchangeable** guardrail that runs the entire length of the bed. This would allow parents the ability to switch the guardrails if the bed were moved. Moreover, since interchangeable guardrails must have a release mechanism that allows parents to separate them from the bed's frame in the event of an emergency, interchangeable guardrails would maintain the integrity of ASTM standard 4.5.2.

ASTM standard 4.6.3 merely prohibits openings in the end structures of the lower bunk large enough for the passage: of a 3.5" X 6.2" X 6.0" wooden wedge block unless the opening is large enough to permit the free passage of a sphere that is nine inches in diameter. [11] This requirement, however, applies only to openings in end structures that are nine inches above the sleeping surface of the bottom bunk. It does not apply to any openings below the lower structure of the top bunk irrespective of whether such openings occur in the bed's end structure.

In one of the incidents involving fatal entrapment on a bed that did conform, the child trapped its head inside an opening between the underside of the top bunk and a

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[10] See, Memorandum of Consumer Product Safety Commission, Nov. 13, 1997 at 2.

[11] American Society of Testing and Materials Consumer Safety Specification for Bunk Beds, ASTM F1427-96.

curved frame member that rose from the floor and connected with the end structure.[12] This bed complied with the ASTM safety standard because there are no provisions dealing with openings that occur between two structural members directly underneath the underside of the top bunk. Moreover, if the child had become trapped within an opening occurring in the end structure directly below the underside of the top bunk there is no provision specifying the width of such openings.

Consequently, an additional provision should be added to the existing standard that prohibits openings which would permit passage of the wooden block that occur between two structural members within nine inches of the top bunk's underside. This standard should apply to all openings within nine inches of the top bunk's underside regardless of whether they occur in the bed's end structure. Such a standard should alleviate the potential for injury resulting from entrapment between a structural member and the underside of the top bunk.

Additionally, the provision prohibiting openings in the end structure within nine inches of the bottom bunk should be changed as well. Instead of limiting the requirement to openings in end structures that are within nine inches of the bottom bunk's sleeping surface, the standard should apply to all openings that occur within nine inches of the bottom bunk's sleeping surface.[13] Such a standard prevents entrapment between the

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[12] See, illustration accompanying Memorandum of Consumer Product Safety Commission, Nov. 18, 1997 at 9.

[13] Although ASTM standard 4.2 could be construed to prohibit openings large enough between the mattress and the other structural members to permit passage of the block, the term "interior bed structure" troubles me. The term lacks clarity and. may not apply to structural members that are part of the exterior bed structure but pose a serious threat nonetheless. In my opinion, the CPSC should either define the term or work with ASTM to promulgate another standard as I state above.

bottom bunk's mattress and another structural member instead of merely limiting the rule to end structures.

In conclusion, I believe it imperative to the safety of our nation's children and our parents' piece of mind to enact and implement a mandatory construction safety standard for bunk beds. When one considers the severity of the risk that non-complying bunk beds pose and the high rate of non-compliance among manufacturers, a mandatory standard is essential. However, the CPSC should not stop with implementing a mandatory standard. The agency should enlist the help of the industry to educate the public concerning the risks of bunk beds and the ASTM standards that are designed to thwart those risks. The CPSC and the furniture industry should work to educate small local and regional manufacturers so they are equipped to comply with the standard. The CPSC should also enlist the help of state attorneys general and consumer groups to lobby for stringent state laws that mirror the federal standard. Such laws will allow state and local officials to get involved with enforcing these standards. Lastly, the CPSC should enact additional safety provisions to alleviate the risks of injury that the current standards do not address. Hopefully, a mandatory standard will allow us all to sleep easier at night.

Consumer Product Safety Commission
63 **Fed. Reg. 3280**
1998 EL 19077 (F.R.)

Comment On Proposed Rules For Bunk Beds

Brett D. Peabody

Introduction

This comment is in response to the Consumer Product Safety Commission's (CPSC) Request for Comments and Information; Advance Notice of Proposed Rulemaking (ANPR); Bunkbeds. 63 Fed. Reg. 3280 (proposed Jan. 22, 1998).

I support the adoption of a mandatory standard to address the risks of injury and death associated with bunk beds. However, I feel the current voluntary standard adopted by the industry is inadequate to protect children from some of the most serious known hazards. I believe that preventable deaths and injuries could still occur, even in beds which conform to a mandatory standard, unless the standard is enhanced to prevent entrapments between the bed and wall and, also, to prevent falls from the top bunk. I urge that the mandatory standard include additional requirements for improved guardrails on the upper bed.

Entrapments between the bed and wall are a significant hazard.

Of the 83 bunk bed related deaths of children under age 15 noted by the CPSC between 1973 and 1990, 16 deaths involved children who reportedly became entrapped between the bed and the wall. [FN1] According to the information contained in the ANPR, two children since 1990 were

fatally entrapped between the bed and the wall even though the beds complied with the current voluntary standard. According to the ANPR, these two entrapments occurred when the children slipped through the space between the end of the guardrail and the bed's end structure and became wedged between the bed and the wall.

While the deaths of these two children make up only a small portion of the total deaths in the CPSC compilation, their deaths are significant because they were easily preventable. As the CPSC stated in a recent press release dealing with bunk bed recalls, "[Even a few] preventable deaths represent a serious situation requiring immediate action." [FN2]

Falls from the upper bed are a significant hazard.

According to CPSC estimates, at least 27 children under the age of 15 have died in falls from bunk beds since 1973. [FN3] When the number of injuries are considered in addition to the number of deaths, the magnitude of this hazard becomes apparent. One limited 1990 study published in the American Journal of Disabled Children (AJDC) suggested that a majority (58%) of all bunk-bed related injuries occur when children fall from the top bed. [FN4] If this is true, then the CPSC's failure to propose performance requirements to address falls avoids the most significant of all bunk bed hazards.

Fall injuries threaten children in ways not reflected by the CPSC's mortality data. Falls from distances less than three times the height of a child generally do not result in death. [FN5] But, such falls can result in debilitating injuries. This is because children tend to fall head first, regardless of the distance fallen or body position during the fall, because their heads are proportionally larger relative to their bodies. [FN6] For this reason, children who fall usually suffer head injuries. [FN7] This phenomenon was apparently confirmed by the AJDC study

which found that 52% of the children who came to the emergency room for bunk bed related injuries suffered head injuries. [FN8]

The proposed mandatory standard should address entrapments between the bed and wall as well as falls.

The two deaths caused by entrapment between the bed and wall, as described in the ANPR, occurred in beds that complied with the current voluntary standard for bunk beds. The implication is that the current voluntary standard is not sufficient to prevent this type of accident. I believe that a standard which mandates full-length guardrails could prevent this type of tragedy in the future.

CPSC suggests that nothing can be done to significantly reduce the number of fatalities due to falls from bunk beds. Little information is provided in the ANPR to justify this view. No information is provided regarding the large number of non-fatal injuries caused by falls from bunk beds. But, due to the potential severity of fall injuries from bunk beds, I believe that the proposed mandatory standard should at least attempt to address the problem. The AJDC study suggested fall injuries could be prevented if guard rails were mandatory for all top beds. [FN9] I believe that a requirement that guardrails extend the full length of the bed would further reduce fall injuries and deaths.

The current voluntary standard1 will likely shape any proposed mandatory standard.

According to the ANPR, the apparent starting point for the proposed mandatory standard will be the American Society for Testing and Materials' (ASTM) Standard Consumer Safety

Specification for Bunk Beds, ASTM F 1427 - 96. The ASTM safety specification for bunk beds has been uniformly adopted by the industry. This is the voluntary standard referred to throughout the ANPR.

There may be some pressure from industry to adopt the ASTM voluntary standard, unaltered, as the proposed mandatory standard. Manufacturers who already comply with the ASTM standard may resist any changes or additional mandatory requirements if the changes or new requirements force them to retool or incur additional manufacturing costs. By default, the ASTM standard may become the mandatory standard. At the very least, the ASTM standard will be the likely basis for formulating a new proposed mandatory standard. Whatever the case, I urge that additional requirements be added to irnprove guardrails.

The voluntary standard does not adequately protect children from entrapment.

The ASTM standard requires, *inter alia*, that all spaces between the guardrails and bed frame, and in the head and foot boards on the top bunk, should be less than 3.5 inches. By limiting the size of openings in the bed structure and between the structure and the mattress, the standard reduces the possibility that children will slip through the openings with their bodies and then become entrapped by their heads. There seems to be universal agreement that limiting accessible openings to a maximum of 3.5 inches effectively prevents entrapment deaths.

To test the compliance of any particular bunk bed, the ASTM standard dictates that a rectangular block, measuring 6.2 inches by 3.5 inches by 6.0 inches and tapered on one end, be used to measure the openings in the bed structure. The block is forced into bed structure openings using a specified amount o-f pressure. If the block passes through, then the opening is considered too large, and the bed fails to comply with the standard. Presumably, if the opening

is large enough for the block to pass through, then the opening is also large enough for the body of a small child to pass.

While the ASTM standard is apparently effective in preventing entrapments of children within the structure of the bed and between the mattress and the structure, as evidenced by the lack of deaths by entrapment in beds that comply with the voluntary standard, the voluntary standard does not disallow all openings of hazardous size. Under the ASTM standard, hazardous openings can still exist between the ends of guardrails and bed end structures.

The voluntary standard allows bunk beds to have dangerous guardrails.

The ASTM standard permits guardrails that terminate before reaching the bed's end structure, providing there is not more than 15 inches between either end of the guardrail and the bed's closest end structure. Some manufacturers evidently leave this gap between the guardrails and the bed posts for stylistic reasons. Other manufacturers use this gap to provide ladder access to the upper bed. The ladder to the upper bed, which is sometimes an integral part of the bed structure, may lead into this gap. The guardrail on the other side of the bed (the wall-side) often matches the outside guardrail in length, perhaps for uniformity. Possibly, guardrails of uniform size are used for ease of production. The unfortunate result of this uniformity is that the voids created by guardrails that do not extend the full length of the bed are places where small children can slip out of the bed.

Guardrail gaps are most dangerous to very young children.

The fifteen inch void at each end of the guardrail, allowed under the ASTM standard, may not

threaten a larger child. A median-sized six-year-old boy is 45.75 inches tall. A median-sized girl is 45 inches tall. [FN10] It seems unlikely that children of this size could accidentally slip through an opening which is shorter than the typical length of their legs. However, a fifteen inch wide void may be a serious hazard for two-year-olds, who average only about 27 inches in height. [FN11] Of course, the greatest threat is to infants, who are so small in stature that they could slip through a fifteen inch gap regardless of their orientation on the bed.

In an apparent effort to reduce the threat of bunk bed entrapment and falls to very young children, the CPSC and manufacturers urge parents not to allow children under the age of six onto the upper bed. According to one manufacturer, "a bunk bed is not a crib." [FN12] The ASTM standard requires that a warning sticker on each bed admonish parents not to allow children younger than six onto the upper bed. Some manufacturers print similar warnings in their instructions. [FN13]

Small children will inevitably wind up on bunk beds.

Warning labels and written instructions have, evidently, failed to keep children younger than six off of bunk beds. 96% of the entrapment deaths between 1990 and 1997 occurred to children under the age of three. [FN14] In a recent press release, the CPSC seemed to acquiesce that parents may be expected to ignore the minimum age recommendation. Consequently, the CPSC suggested that bunk bed standards should be formulated to protect children even when the warning labels and instructions are not followed. [FN15]

I believe that parents' failure to heed the six-year-old minimum age warning may be valid and understandable in certain situations. Most children are physically able to climb up into upper beds at a much earlier age. Developmentally, most three to four-year-olds are strong enough and

coordinated enough to climb quite well. [FN 16] Whether a child can safely climb in and out of an upper bed is a subjective decision that parents make on an individual basis, depending on the characteristics of the individual child. Also, age is not strictly related to size. By my measurement, my four-year-old boy is about the same size as my six-year-old girl. Neither child can fit, even partially, through a 3.5 inch opening. Consequently, I think a great many parents, like myself, feel that their children are "ready" for the upper bed long before their sixth birthday.

Having exempted my children from the age-six minimum requirement, I still could not fathom allowing either one of them to climb onto the upper bed prior to age three. I felt the risk of falling or suffocation from entrapment was too great. Yet, other parents seem to exempt even their one-year-olds and two-year-olds from the bunk bed hazard warnings, according to CPSC information. I wonder if some of these other parents are being too careless. Nevertheless, I cannot object to their decision to disregard the age-six minimum recommendation because I, too, disregarded the warning. Perhaps parental discretion should be respected. My point is this: even children of careless parents can be protected by well-conceived mandatory standards. Making bunk beds safer for very small children by better design standards may be more practical and effective than trying to enforce the age-six minimum requirement.

Mandatory full-length guardrails could save lives.

I believe that a barrier, extending at least five or six inches above the top of the mattress, that completely encircles the upper bunk, would provide excellent protection against both entrapment and falls. The ANPR suggests that tlhe two fatalities from entrapment between the bed and wall could have been prevented if the guardrails had extended all the way to the bed end structures. I believe that any barrier that completely encircles the upper bunk and otherwise complies with the

ASTM standard would eliminate the most dangerous hazards for even very small children.

Personal testing confirms the safety of full-length guardrails.

To see for myself if full-length guardrails are safer, I used my own four-year-old son and six-year-old daughter as test subjects. I also fabricated a wedge block as described in the ASTM standard. I used the test block to locate spaces between the wall and bed structure that exceeded the 3.5 inch maximum spacing allowed in the ASTM standard. Then, I coaxed each of my children into partially squeezing into the spaces that exceeded the maximum allowable width. [FN17] As crude as this procedure may seem, it was obvious to me from these experiments that an entrapment hazard results when guardrails do not extend the full length of the bed.

First, I tested my son's bunk bed, which is a heavily constructed wooden bed with solid wood end structures and full-length guard rails made from wide wooden planks running from head to foot. The guardrails fit securely into deep slots in the end structures and are secured with screws. Except for the labeling requirements, this bed appears to conform to the voluntary standard in every way. I do not know who manufactured it. I attacked every void in the upper bunk area with the test block and was unable to pass the block through at any point in the structure of the bed, even with the mattress removed. In search of an entrapment hazard between the bed and the wall, I tried to force the block between the guardrail and the wall, but I could not pass the block through when the bed was less than three inches from the wall. Interestingly, the leverage achieved by pushing against the wall from the top bed made it possible to create a gap of more than 3.5 inches when the bed was 3 inches or more from the wall. This feat was not possible from the lower bunk. But even when a large gap was forcibly created between the bed and the wall, the full-length guardrail seemed to be an adequate barrier to entrapment. Even when

challenged and enticed, my son could not force his body through any opening accessible from the upper bed beyond his thighs. As a result of my experiment, I am convinced that this bunk bed design, which includes the full-length guardrail, adequately protects my small child from entrapment.

My daughter's bunk bed is apparently not as safe. It is a tubular steel design with a full-size lower bed and a twin bed on top. As far as I can tell, this bed also meets the ASTM voluntary standard except for the lack of warning labels. I cannot tell who manufactured the bed. I was unable to pass the test block through any space of the bed structure from the upper bunk, even with the mattress removed. There were dangers, however, at both ends of the shortened guard rails. The rails on this bed are only 46 inches long. Thus, there are gaps of nearly 15 inches between each end of the guardrails and the bedposts. On the outer side of the bed, one of these gaps is used for ingress and egress, to and from the hook-on ladder. On the wall-side of the bed, each gap provides easy access to the place where the side rail runs close to the wall. I found that I could easily force the test block between the bed and the wall in these spaces when the bed was positioned two inches or more

from the wall. Again, the leverage from being in the upper bed allowed me to widen the gap between the wall and bed by pushing against the wall. This was nearly impossible to do in the lower bed. Notably, it was easier to widen the space between the bed and wall from the upper bed on my daughter's tubular steel bed than it was on my son's heavy wooden bed because the steel bed was somewhat less rigid. When the steel bed was placed a mere four inches from the wall, my daughter was able to widen the gap by pushing against the wall, and then wriggle her body between the bed and wall, all the way down to her armpits. Her body easily fit within the 15 inch spaces in the comers of the bed. The danger of entrapment to my daughter was obvious on this bed, even though she exceeded the minimum age requirement.

The primary difference between my son's bunk bed and my daughter's bunk bed was the length of the guardrails. Otherwise, the beds compared favorably. Even though the beds were very different in construction, both beds tested well in my view. Both beds seemed to comply with the ASTM standard. The main difference was the guardrails. My son's bed, which had full-length guardrails seemed quite safe as a result of my experiments. My daughter's bunk bed, with its fifteen inch gaps in each corner, seemed quite unsafe, in my view. I concluded that longer guardrails make safer beds.

Full-length guardrails may help prevent falls as well as entrapments.

Full-length guardrails help keep children in the upper bed. Just as surely as a well-designed wall-side rail prevents entrapment between the wall and the bed, a well-designed outside rail prevents some children from slipping out of the upper bed onto the floor.

Some falls undoubtedly occur during horseplay. Other falls occur when children climb over the top of guardrails while getting in or out of the top bed. Such falls as these might be hard to prevent with any practical design standard. Nevertheless, the AJDC study indicates that 29% of injury-producing falls occur during sleep. [FN18] So, while not all falls are preventable, better barriers capable of holding sleeping children of all sizes in the upper bed may, in fact, reduce the incidence of injuries and deaths from falls.

Conclusion

A mandatory standard consumer safety specification for bunk beds would probably save lives. A mandatory standard which requires full-length guardrails on upper beds would probably save

more lives.

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FN1. Introduction, STANDARD CONSUMER SAFETY SPECIFICATION FOR BUNK BEDS, ASTM F 1427-96.

FN2. Press Release: "CPSC Announces Recall of Catalina Furniture Wooden Bunk Beds," (September *28,* 1995) *via the internet.*

FN3. Introduction, STANDARD CONSUMER SAFETY SPECIFICATION FOR BUNK BEDS, ASTM F 1427-96.

FN4. Selbst, Baker, & Shames, *Bunk Bed Injuries,* AM J DIS CHILD 1990 Jun; 144(6): *721-3.*

FN5. MICK J. SANDERS, MOSBY'S PARAMEDIC TEXTBOOK 411 (1994).

FN6. *Id.*

FN7. *Id.*

FN8. Selbst, Baker, & Shames, *Bunk Bed Injuries,* AM J DIS CHILD 1990 Jun; 144(6): *721-3.*

FN9. *Id.*

FN10. RICHARD E. BERMAN & VICTOR C. VAUGHAN, NELSON'S TEXTBOOK OF PEDIATRICS *34-35* (1984).

FN11. *Id.*

FN12. Press Release: "CPSC Announces Recall of Catalina Furniture Wooden Bunk Beds," (September 28, 1995) *via the internet.*

FN13. *Id.*

FN14. ANPR

FN15. Press Release: "CPSC Announces Recall of Catalina Furniture Wooden Bunk Beds," (September *28,* 1995) *via the internet.*

FN16. RICHARD E. BERMAN & VICTOR C. VAUGHAN, NELSON'S TEXTBOOK OF PEDIATRICS 37 (1984).

FN17. Children were carefully used in the experiment under the watchful eye of their mother, a former emergency department physician.

FN18. Selbst, Baker, & Shames, *Bunk Bed Injuries,* AM J DIS CHILD 1990 Jun; 144(6): 721-3.

Bunk bed injuries.

Am J Dis Child 1990 Jun;144(6):721-3

Selbst SM; Baker MD; Shames M
(90266829 NLM)

Bunk beds are commonly used in American households, yet to our knowledge, no studies have been done to determine if they are safe. We prospectively studied the incidence, epidemiology, and outcome of injuries related to bunk beds. We interviewed all patients with such injuries who presented to the emergency department between February 1987 and February 1988. A control group of children who use bunk beds but who came to the emergency department for another reason were also interviewed. There were 68 injured children and 54 controls during the l-year study period. There were 47 injured children (70% of this group) and 26 control children (48% of this group) younger than 6 years, which is below the age recommended by the Consumer Product Safety Commission for bunk bed use. Carpeted floors were significantly more common in the control group, 67% (36 children) vs 42% (26 children:). Injuries occurred most often when the child fell from the top bed (3 8 children [58%]), fell off the ladder (7 children [1 1%]), or fell off the bottom bed (8 children [12%]). Injuries occurred during sleep (19 children [29%]), getting in or out of the bunk bed (13 children [20%]), or playing in or near the beds (28 children [43%]). Of those injured while asleep, 13 of 19 children were younger than 6 years. Head injuries accounted for half the trauma (35 children [52%]), and extremities were involved in 16 patients [24%]. The most common injuries were lacerations (27 children [40%]) and contusions (19 children [28%]), but 8 children (12%) had concussions and 7 children (10%) had fractures. Six children (9%) required admission to the hospital. Head and face injuries were significantly more likely if the top bed had no side rails. These data suggest injuries could be prevented if side rails were mandatory for all top beds, young children

were not permitted to sleep in bunk beds, and all children were encouraged not to use the beds for play.

Keywords: Accidents; Child; Injuries; Risk factors; Prevention

Designation: F 1427 – 96

AMERICAN SOCIETY FOR TESTING AND MATERIALS
100 Barr Harbor Dr., West Conshohocken, PA 19428

Standard Consumer Safely Specification for Bunk Beds'

This standard is issued under the fixed designation F 1427; the number immediately following the designation indicates the year of original adoption or, in the cue of revision, the year of last revision. A number in parentheses indicates the year of last reapproval. A superscript epsilon (ε) indicates an editorial change since the last revision or reapproval.

INTRODUCTION

This consumer safety specification addresses bunk bed accidents that were identified by the U.S. Consumer Product Safety Commission (CPSC).

The CPSC estimates that in 1989, about 34 000 bunk bed-related injuries were treated in U.S. hospital emergency rooms, and about three fourths of those injured were under the age of 1 5. Most of these injuries were minor and were associated with victims who fell from, bumped into, or jumped from bunk beds. However, there are other less-obvious potentially serious hazards associated with bunk beds. For example, from 1973 through November 1990, CPSC also received reports of 83 deaths of children less than 15 years of age involving bunk beds. Seventy-four incidents, including 17 deaths, involved children who reportedly became entrapped between the mattress and guardrail; 24 incidents. including 5 deaths, involved children who reportedly became entrapped either between the mattress and bed structure or in the bed end structure; and 18 incidents, including 16 deaths, involved young children who reportedly became entrapped between the bed and the wall. The CPSC also received reports of 4 deaths due to failure of the mattress support, 19 deaths due to falls from bunk beds, 12 deaths due to strangulation when a belt, rope, or clothing became caught on the bed structure. and 10 deaths due to other or unknown causes.

1. Scope

1.1 This consumer safety specification establishes minimum requirements for the design and performance of bunk beds. It also contains requirements for labeling and instructional material.

1.2 This consumer safety specification is intended to minimize accidents to children resulting from normal use and reasonably foreseeable misuse or abuse of bunk beds. This consumer safety specification is written within the current state of the art of bunk bed technology and does not address bunk beds that are blatantly misused or are used in a careless manner that disregards warning statements and safety instructions provided with each bunk bed.

1.3 For the purposes of this consumer safety specification, a *bunk* bed (hereinafter referred to as a bed) is defined as any bed in which the underside of the foundation is over 35 in. (890 mm) from the floor.

1.4 This consumer safety specification does not. address bunk beds for institutional use (for example, in prisons, military facilities, dormitories, and so forth).

1.5 The values stated in inch-pound units are to be regarded as the standard. The values given in parentheses are for information only.

1.6 The following safety hazards caveat pertains only to the test methods portion, Section 5, of this specification: *This standard does not purport to address all of the safiy concerns, if any, associated with its use. it is the responsibility of the user of this standard to establish appropriate safety and health practices and determine the applicability of regulatory limitations prior to use,*

2. Referenced Document8

2.1 *Federal Standards:*

16 CFR Part 1303 Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint[2]

16 CFR Part 1500 Hazardous Substances Act Regulations,[2] including sections:

1500.48 Technical Requirements for Determining a Sharp Point in Toys and Other Articles Intended for Use by Children Under 8 Years of Age[2]

1500.49 Technical Requirements for Determining a Sharp Metal or Glass Edge in Toys and Other Articles Intended for Use by Children Under 8 Years of Age[2]

16 CFR Part 1501 Method for Identifying Toys and Other Articles Intended for Use by Children Under 3 Years of Age Which Resent Choking Aspiration or Ingestion Hazards Because of Small Parts[2]

16 CFR Part 1632 Standard for the Flammability of Mattresses and Mattress Pads[2,3]

[1] This specification is under the jurisdiction of ASTM Committee F-IS on Consumer Products and is the direct responsibility of Subcommittee F15.30 on Bunk Beds.

Current edition approved July 10, 1996. Published September 1996. originally published as F 1427 – 92. Last previous edition F 1427 – 94.

[2] Federal regulations 16 CFR Part 1303, 16 CFR Section 1500.48, 16 CFR Section 1500.49, 16 CFR Part 1501, and 16 CFR Part 1632 are in effect and are administered by the CPSC. These federal regulations are not a part of this safety specification. This information is offered to all parties so that they know that these federal regulations must be adhered to outside the scope of this safety specification. Copies of the regulations may be obtained from The Office of the Secretary, U.S. Consumer Product Safety Commission, Washington, DC 20207.

[3] If beds are accompanied by mattresses.

3. Terminology

3.1 *Descriptions of Terms Specific to This Standard:*

3.1.1 *bed, n—for the purpose of this specification,* a bunk bed, as described in 3.1.5.

3.1.2 *bed end structure, n-an* upright unit at the head and foot of the bed, to Which the side rails attach.

3.1.3 *bed post, n-an* upright post at each comer of the bed structure.

3.1.4 *bed structure, n*—furniture parts ambled for the purpose of providing a sleeping environment.

3.1.5 *bunk bed, n-for the purpose of this specification,* any bed in which tbe underside of the foundation is over 35 in. (890 mm) from the floor.

3.1.6 *foundation, n-of a bed, the base or* support for a mattress.

3.1.6.1 Discussion-The foundation may be independent from or incorporated with the sleeping surface.

3.1.7 *foundation support system, n—of a bed,* those components of the bed structure that support the foundation.

3.1.8 guardrail, n—of a *bed,* a rail attached to each long side of the bed to help prevent a sleeping occupant from rolling or sliding out of the bed.

3.1.9 interior bed structure, n-the interior faces of the side rails and bed end structures.

3.1. IO *mattress,* n-a manufactured product intended to be slept on, consisting of various resilient materials covered with an outer ticking

3.1.11 permanent marking, n-a marking *or label* shall be considered permanent if, during an attempt to manually remove it without the aid of tools or solvents, it cannot be removed, it tears, or it damages the surface to which it is attached.

3.1.12 *side rail, n—of a bed structure, the* rail attached to the bed end structures to which the foundation support system is fastened.

4. Performance Requirements

4.1 *Fit of Top Bed to Bottom Bed*—The bed post shall be designed so that the minimum height of lift to allow horizontal disengagement of the top bed from the bottom bed shall be 1¼ in. (32 mm), or a fastening mechanism may be used that will prevent the disengagement of the top bed from the bottom bed.

4.2 Mattress and Foundation Size and Fit—There *shall* be no gaps between the interior bed structure and the edges of the mattress and foundation that will permit complete passage of the wedge block shown in Fig. 1 when tested in accordance with 5.2.1 through 5.2.3.

4.3 Foundation Support System:

4.3.1 The foundation support system shall confine the horizontal position of the mattress and the foundation and shall prohibit the mattress and foundation from falling into the clearance over the lower bunk or to the floor when the mattress or foundation is manipulated.

4.3.2 In the event cross-members are utilized, a minimum of two per bed are required. If more than two cross-members are utilized, they shall be spaced so that the distance 'between adjacent cross-members of between the cross-members and the bed end structures is less than 3½ in. (90 mm) or greater than 9 in. (230 mm).

4.3.3 The foundation support system shall not be capable of being dislodged without the release of positive fastening devices or the use of hand tools.

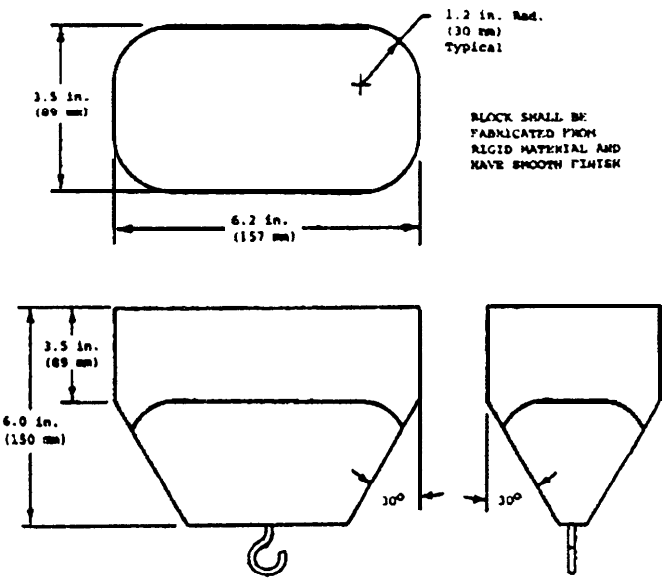

FIG. 1 Wedge Block for Tests in 5.2.3, 5.5.1, and 5.6.1

4.3.4 The foundation support system shalt not fail when tested in accordance with 5.3.1.

4.4 Side Rails:

4.4.1 *Bolt-On Side Rails,* that attach 'at their ends or on their side to the bed post, shall be secured at each end by two bolts with a minimum size of *A-in. (6-mm) diameter. For wood beds these bolts shall be spaced a minimum of 1 ½ in. (40 mm) apart on their centers. When the bolts are fully tightened in the assembled bed, no more than ¼ in. (6 mm) of thread shall be exposed.

4.4.2 Hook-On Side Rails, securely attached to the bed post. Hook-on attachments shall require an additional action other than an upwards force to disengage.

4.4.3 *Side Rail Attachments*—There shall be no structural failure of bed side rail fastening systems when tested in accordance with 5.4.1.

4.5 Guardrails:

4.5.1 Two guardrails shall accompany any bed in which the underside of the foundation is over 35 in. (890 mm) from the floor. Guardrails may be separate from or integral with the ladder.

4.5.2 Guardrails shall be attached in a manner that requires the intentional release of a fastening device or be so designed that they cannot be removed unless forces are applied sequentially in different directions.

4.5.3 The upper edge of the guardrails shall be at least 5 in. (130 mm) above the sleeping surface when a mattress of a thickness that is the maximum specified by the manufacturer's instructions is used on the bed.

4.5.4 With no mattress on the bed, there shall be no openings in the rigid bed structure below tbe lower edge of the guardrail that would permit complete passage of the wedge block shown in Fig. 1 when tested in accordance with 5.5.1.

4.5.5 A guardrail may terminate before reaching the bed

end structure, providing there is no more than 15 in. (380 mm) between either end of the guardrail and the bed end structures in the same plane.

4.6 *Bed End Structure:*

4.6.1 The upper edge of the upper bunk end structures for at least 50 % of the distance between the two posts at the head and foot of the upper bunk shall be at least 5 in. (130 mm) above the sleeping surface when a mattress and foundation of the size and thickness specified by the manufacturer's instructional literature is used on the upper bunk.

4.6.2 There shall be no openings in the rigid end structures of the upper bunk that will permit the free passage of the wedge block shown in Fig. 1 when tested in accordance with 5.6.1. This requirement shall apply only to that portion of the bed end structure that is above the foundation support system of the upper bunk.

4.6.3 When tested in accordance with 5.6.2, there shall be no openings in the end structures of the lower bunk that will permit free passage of the wedge block shown in Fig. 1, unless they are large enough to permit the free passage of a 9 in. (230 mm) diameter rigid sphere. This requirement does not apply to openings that are below the level of the lower bunk foundation support system or above a level that is 9.0 in- (230 mm) above the sleeping surface of the maximum thickness mattress and foundation combined as recommended by the manufacturer.

4.7 Ladders:

4.7.1 A lean-on (slanted) or hang-on (vertical) ladder shall be supplied with each bunk bed set or the ladder may be incorporated as part of the bed structure. The ladder may be separate from or integral with the guardrail. The ladder shall be attached in a manner that prevents inadvertent disengagement, repositioning, or tilting while in use.

4.7.2 The width of the ladder shall be no less than 10 in. (250 mm) measured from the inside of the stiles. Vertical spacing of ladder steps shall be no greater than 12 in. (300 mm) when measured from the floor to the first step or between steps. When bed structures are used as ladders, vertical spacing may be up to 16 in. (400 mm).

4.8 *Metal Beds: Frame and Fastenings*—There shall be no separation of any of the attachments of the foundation support system to the end structures of the bed when tested in accordance with 5.7.1.1 and 5.7.2.

5. Test Methods

5.1 Assemble the bed in accordance with the provided instructions.

5.2 Mattress and Foundation Size and Fit (see 4.2):

5.2.1 Place the intended mattress and foundation, as specified by the instructions, on the bed.

S.22 Move the mattress and foundation horizontally to obtain the largest gap between the interior bed structure and the edge of the mattress and foundation.

5.2.3 Insert the wedge block shown in Fig. 1, tapered side downwards, and in the most adverse orientation, into any gap and gradually apply a 45-lbf (200-N) vertically downwards force. Sustain the force for a period of 1 min.

5.3 *Foundation Support System* (see 4.3)—Center a sheet of ¾-in. (19-mm) thick plywood with dimensions 19 in. (480 mm) by 37 in. (940 mm) on the manufacturer's intended foundation (37-in. dimension parallel to the long axis of the bed), and place weights with a total mass of 400 lb (181.4 kg) on the plywood sheet. The weights shall be applied gradually and shall remain in place for a minimum of 5 min.

5.4 *Side Rails* (see 4.4)—Apply a downward vertical force of 225 lbf (1000 N) gradually, 10 in. from the bed end structure, and sustain it for 30 s. Apply the force sequentially to each corner of the bed.

5.5 *Guardrails* (see 4.5)—Place the wedge block shown in Fig. 1 into any opening in the rigid bed structure below the level of the guardrail, tapered side first, and in the most adverse orientation, and gradually apply a 33-lbf (148-N) force in a direction perpendicular to the plane of the opening Sustain the force for a period of 1 min.

5.6 *Bed End Structure (see 4.6):*

5.6.1 Place the wedge block shown in Fig 1 into any opening, tapered side first, and in the most adverse orientation. Determine if the wedge block can pass freely through the opening.

5.6.2 *Lower Bunk End Structure (see 4.6.3):*

5.6.2.1 Without a mattress or foundation on the lower bunk, place the wedge block shown in Fig 1 into any opening, tapered side first, in the most adverse orientation, Determine if the wedge block can pass freely through the opening If the wedge block passes freely through the opening, determine if a 9 in. (230 mm) diameter rigid sphere can pass freely through the opening.

5.6.2.2 With the manufacturer's recommended maximum thickness mattress and foundation in place, repeat the test in 5.6.2.1.

5.7 Metal Beds-Frame and Fastenings;

5.7.1 For testing in accordance with 5.7.1.1, the bed shall be prevented from sliding in a manner that does not prevent changes of angle that may take place in the bed structure.

5.7.1.1 Position a test load of 165 lb (75.0 kg) at the center of the upper foundation support system on an area not to exceed 12 in. (300 mm) square (if foundation support systems will not permit the test load to be so positioned, it is permissible to add a platform to support the test load in such a way as to not increase the structural integrity of the bed). Apply an alternate force of 67 lbf (300 N) for 10 000 cycles at each point in the order ABCD or AB followed by CD at a rate not more than 24 loads per minute (see Fig. 2). The points for applying the test forces shall be located as near the center of the vertical bunk bed support as practicable at the height of the upper foundation *support* system.

5.7.2 After testing in accordance with 5.7.1.1, remove the 165-lb (75.0-kg) load and apply a 67-lbf (300-N) force in directions most likely to cause separation between the end structure and foundation support system. The force shall be applied at each point of attachment of the foundation

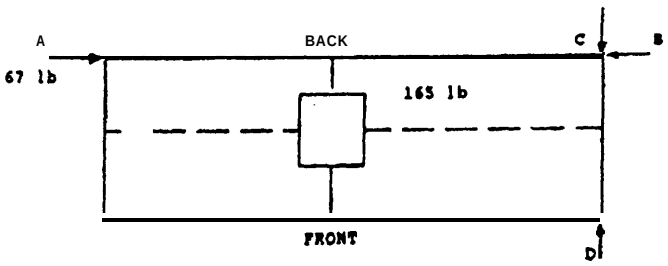

FIG. 2 Points for *Applying* Test Forces

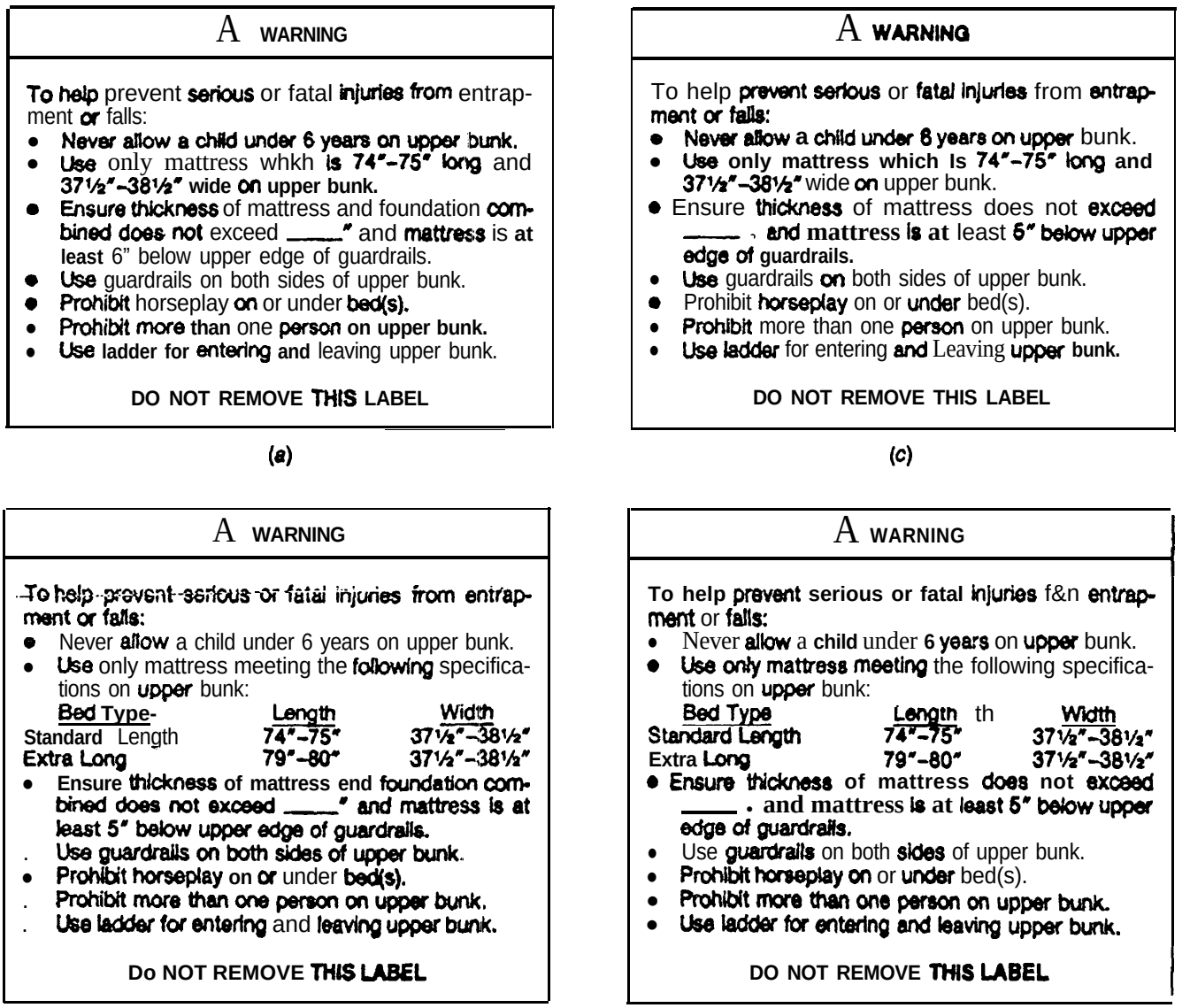

FIG. 3 w - W I -

support system to the end structure (point of applications shall be as close as practical to the point of attachment). The force shall be applied to either the end structure or foundation support system, whichever appears most likely to cause separation.

6. Marking and Labeling

6.1 There shall be a permanent label or marking on each bunk bed set to enable a consumer to identify the name, city, and state of the manufacturer, distributor, or seller and the month and year of manufacture.

6.2 Warnings:

6.2.1 The warning label requirements for beds not containing a mattress foundation as an integral part of the structure are addressed in 6.2.1.1. The warning label requirements for beds containing a mattress foundation as an integral part of the structure are addressed in 6.2.1.2. Although the wording contained in the warnings shall not deviate from that shown in the referenced figures, either in content or size (6.2.2), the size and shape of the label is not specified. The label may be configured to best fit the size and shape of the upper bed end structure. The warning labels shown in the referenced figures provide dimensions for twin and twin extra-long mattresses. If a bed is designed to use other than a twin or a twin extra-long mattress on the upper bunk, the label shall chain sizes appropriate to that mattress as defined in the *ISPA Voluntary Dimensional*

Guideline for Bedding Products and Components.[4]

6.2.1.1 If the foundation is not an integral part of the bed structure, the warning label shown in either Fig. 3(*a*) or 3(*b*) shall be attached permanently to a bed end structure of the upper bunk in a location that cannot be covered by the bedding but that may be covered by the placement of a pillow.

6.2.i .2 If the foundation is an integral part of the bed structure, the warning label shown in either Fii 3(c) or 3(*d*) shall be attached permanently to a bed end structure of the upper bunk in a location that cannot be covered by the bedding but that may be covered by the placement of a piuow.

6.2.2 The letters of the word *warning* shall be in uppercase boldface type not less than 5/16 in. (5 mm) high. The letters *of the words do not remove this label shall* be in uppercase boldface type not less than 1/8 in. (3 mm) high. The remainder of the text of the label shall be no less than 1/8 in. high with the words to *help prevent* in boldface type.

6.2.3 Warnings, including applicable mattress dimensional specifications, shall appear on the carton containing bed ends on at least one face and one end. The letters shall be not less than 5/16 in. (5 mm) high.

7. Instructional Literature

7.1 Printed instructions shall accompany each bunk bed set including as a minimum, the following infomnation:

7.2 *Parts List*—All parts necessary to assemble the bunk bed set shall be listed, together with the tools necessary for its assembly.

7.3 *Assembly Instructions*, containing detailed diagrams showing exactly how the bed should be assembled, including specific instructions pertaining to the following

7.3.1 Bed end structures,

7.3.2 Attachment of side rails,

7.3.3 Installation of the mattress/foundation support system,

7.3.4 Fit of upper bunk to lower bunk,

7.3.5 Attachment of guardrails, and

7.3.6 Attachment of ladder.

7.4 *Size of Mattress and Foundation*-The size of the intended mattress shall be clearly stated. The dimensions for length and width may be stated numerically or may be stated in conventional terms, for example, twin size, twin extra long, and the like. In addition, the maximum thickness of the mattress that will ensure conformance to the guardrail provision of 4.5.3 shall be stated.

7.5 *Replacement Parts*—Replacement parts, including additional guardrails, may be obtained from any of our (insert manufacturer's name) dealers.

7.6 *Safety Warnings*—The instructions shall contain the following warning in formation:

7.6.1 Follow the information on the warnings appearing on the upper bunk end structure and on the carton. Do not remove warning label from bed.

7.6.2 Always use the recommended size mattress or mattress support, or both, to help prevent the likelihood of entrapment or *falls.*

7.6.3 Surface of mattress must be at least 5 in. (127 mm) below the upper edge of guardrails.

7.6.4 Do not allow children under 6 years of age to use the upper bunk

7.6.5 Periodically cheek and ensure that the guardrail, ladder, and other components are in their proper position, fret from damage, and that all connectors are tight.

7.6.6 Do not allow horseplay on or under the bed and prohibit jumping on the bed.

7.6.7 Always use the ladder for entering and leaving the upper bunk

7.6.8 Do not use substitute parts. Contact the manufacturer or dealer for replacement parts.

7.6.9 Use of a night Light may provide added safety precaution for a child using the upper bunk.

7.6.10 Always use guardrails on both long sides of the upper bunk-

7.6.11 The use of water or sleep flotation mattresses is prohibited.

7.6.12 Keep these instructions for future reference.

8. Keywords

8.1 bunk beds; children's furniture; guardrails; ladders; mattress support

[4] International Sleep Products Assn., 333 Commerce Street, Alexandria, VA 22314.

BEFORE THE CONSUMER PRODUCT SAFETY COMMISSION: PROPOSED RULEMAKING FOR 16 CFR Chapter II

COMMENT OF NICK TOOLEY REGARDING A PROPOSED MANDATORY STANDARD FOR THE MANUFACTURING OF BUNK BEDS

This comment will address the difficulties associated with implementing a mandatory regulation regarding the structural features of bunk beds intended for use by children. I hope to show the lack of need for such a drastic solution, and will propose an alternative means of dealing with the problem at hand.

Is a Mandatory Standard Necessary?

The Consumer Product Safety Commission ("CPSC") is presently considering converting the Guidelines developed by the ASTM in September, 1996 as a voluntarily observed industry practice to a mandatory standard accompanied by enforcement procedures and possibly a set of heightened requirements. The CPSC has provided data showing that, in the past eight years, 54 children have reportedly died from entrapment in bunk beds which have failed to comply with industry guidelines regarding adequate spacing between guardrails and other parts of the bed.[1]

While the CPSC's desire to prevent the accidental deaths of young children is

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[1] 63 FR 3280, 3281

unquestionably a laudable social aim, its choice of methods for bringing about this goal is one that is problematic from both the standpoint of individual freedom and social welfare.

In its advance notice on the proposed rule, the CPSC has provided a chart detailing the number of children's deaths resulting from entrapment between 1990 and 1997.[2] The CPSC maintains that this in fact represents an average of ten deaths per year during that time period. However, this is overstating the case. The correct average is in fact 6.75 or roughly 7 deaths a year resulting from noncompliance with the voluntary standard. Even if the higher number were accepted as the better estimate, this would still represent only .00002% of all bunk beds sold each year. Moreover, the CPSC estimates the number of bunk beds currently in use to be somewhere in the range between 7 to 9 million,[3] so the statistical significance of the raw figure is diminished still further. While the dieath of a child is always a tragedy, the sheer infrequency of accidental deaths occurring on bunk beds is so great as to merit regarding them as freak happenings.

The problem of bunk bed entrapments that the mandatory rule would address can easily be seen as a statistically remote danger, at worst. What's more, the attempt to force a uniform standard on all manufacturers would create a set of new hardships that merit the attention of policymakers. The CPSC estimates that the cost of compliance with the proposed regulations would be between $15 and $40 for each bunk bed

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[2] Id.

[3] Id. at 3282.

produced. It juxtaposes this expense to an ostensible $174 to $346 in costs to society for the death of a child and concludes that even if the new measures proved to be only minimally successful, a balance between overall benefits and costs would nevertheless be achieved.[4] Even assuming these particular quantifications to be accurate, I still believe that the wrong question is being asked in regard to this matter. While the consideration of overall costs is certainly important, the crucial concern should be who will ultimately be made to bear this expense. Although the immediate burden of compliance would fall on delinquent manufacturers, they in turn would be compelled to pass on the added costs to their customers in the form of higher prices. While $15 to $40 may seem like an inconsequential sum to a detached observer, it takes on an entirely different light when seen from the perspective of young parents looking to budget their funds in as efficient a manner as possible.

Furthermore, the consequence of such an increase in price may in fact run deeper than simply the additional expense. If the parents in question are indigent or living on the margin between poverty and solvency, the new price may make the purchase of bunk beds prohibitively expensive. Since such families are much more likely to be living in cramped conditions to begin with, the additional reduction in living space could result in a significant irnpairment of their quality of life. Before implementing a regulation designed to avert a statistically remote danger to some children, the much more certain and widespread impact of such a rule on the economic well-being of other children should be taken into account.

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[4] Id. at 3283.

There is always room for improvement in any matter of product safety. Nevertheless, the justification for enacting a mandatory rule, in light of the actual dangers involved and the very real costs stemming from its adoption, is extremely weak.

Alternatives to a Mandatory Standard:

While the level of danger existing to children who use bunk beds is not sufficiently great to merit the imposition of a mandatory standard, the problem is nevertheless real and warrants some kind of measure to minimize the number of accidents that occur.

The statistical information provided by the CPSC points to two main problems stemming from current practices: wiidespread noncompliance with the voluntary standard by peripheral firms and the special vulnerability of young children to the unique dangers posed by bunk beds.[5] Both problerns could be remedied (to the extent that they are problems) by the voluntary action of manufacturers, given the proper impetus by the government.

The sociologist Charles Murray has recently proposed a system by which government can insure that private industry is sufficiently cognizant of the interests of consumers without resorting to interference with the workings of the market. Working from a libertarian standpoint, Murray holds that the key concern in the regulation of business should be the protection of consumers from fraud. Thus, he would use the

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[5] Id. at 3281-2.

government's regulatory powers only to curb deceptive practices in product advertising.[6] Otherwise, businesses should be left free to design and market their products as they see fit. This aim could be achieved simply by a legal requirement that all goods sold bear a label stating their compliance or noncompliance with an approved governmental standard.[7] Customers would still have the advantage of governmental scrutiny if they bought complying products. At the same time, the desire to retain consumer confidence might very well lead businesses which do not wish to submit to government regulation to devise and publicize standards of their own.[8]

While Murray is able to point to the relative absence of regulatory measures prior to the 1960's to support his case for industry self-policing,[9] an even more recent example of this could be found in Japan. Although Japan adopted stricter product regulation rules (including a strict liability standard) in 1995, in the previous twenty years several Japanese businesses had already opted for a privately administered system of product testing and labeling. [10] Bunk bed manufacturers (among others) voluntarily submitted samples of their work to a Product Safety Council. This entity, although government-sponsored, had no rulemaking power. The Council would test the

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[6] Charles Murray, What It Means To Be A Libertarian, New York: Broadway Books (1997), at 60.

[7] Id. at 60, 64-66.

[8] Id. at 68.

[9] Id. at 61.

[10] J. Mark Ramseyer, "Products Liability Through Private Ordering: Notes On A Japanese Experiment," 144 U. Pa. L. Rev. 1823, 1827-9.

submitted items and, if they passed muster, allow companies to market them with an approving label." Manufacturers who dealt with the Council also accepted a strict liability standard for injuries occurring in the course of normal use of their products.[12]

Thus, Japanese customers were given a choice of buying more costly, regulated products or cheaper, unregulated goods.[13] Although political pressures ultimately led to an across-the-board adoption of strict liability for consumer goods, the old system worked remarkably well. Over the twenty year period preceding the implementation of the new rules, only 727 claims for damages were filed with the Council, as opposed to roughly 14,000 in the United States during that time.[14] The Japanese experience stands out as an encouraging instance of lhow self-monitoring by the private sector can serve the public good.

And so it could be with the American bunk bed industry. Fortuitously, the voluntary guidelines issued by the ASTM and already followed by most furniture manufacturers in this country point the way to a market-oriented, minimally intrusive solution. The current voluntary standards (which should be sanctioned by the CPSC) call for the presence of warning labels on the beds, informing parents of the possible risks involved.[15]

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[11] Id. at 1829.

[12] Id. at 1831.

[13] Id. at 1840.

[14] Id. at 1837.

[15] 63 FR 3280, 3281.

I propose adopting the Murray approach and making the use of such labels mandatory throughout the industry, and also requiring the disclosure on such labels of the company's compliance or noncompliance with the Guidelines. In addition, the labels should clearly state that young children ("3 or under") in particular are especially vulnerable to bunk bed accidents. Having been thus cautioned, the parents should be free to make their own purchasing (decisions.

The presence of such labels, coupled with mandatory disclosure, should be sufficient in itself to encourage manufacturers to adopt practices which will promote the well-being of the consumers, since the consumers will ultimately decide who receives their business. One of two things will happen. The first possibility is that parents would heed the warning labels and purchase their bunk beds only from complying manufacturers. This would have the salutary effect of forcing noncomplying manufacturers into conforming to the industry standard as a simple business necessity. Thus, the result desired by the CPSC would be achieved without recourse to more active state intervention.

The second possibility is that many parents would continue to buy the less expensive, noncomplying bunk beds. Thus, a market would continue to exist for manufacturers who refused to adhere to the industry guidelines. Such a situation, however, would not indicate exploitation of consumer ignorance by interested businesses, but rather an informed belief on the part of consumers that protection against the distant dangers of entrapment does not justify paying a higher price for a bunk bed built in conformance to the guidelines.

Concluding Remarks:

Governmental recognition of the current industry standard and a requirement that companies label their products accordingly would provide the most satisfactory solution to the current problem. The government will have taken adequate steps to insure that safety concerns are given the priority they deserve. Manufacturers will retain the right to make their own decisions regarding the goods they sell. Most importantly, parents, who ought to be presumed to be the best judges of their children's interests, will not be constrained in their power to choose the products best suited to their needs.